Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1998

Dorthea and Joseph Zrnchik, et al.,
Petitioners,

v.

Amoco Oil Company,
Respondent

On Petition for a Writ of Certiorari
To the Supreme Court of Indiana

PETITION FOR WRIT OF CERTIORARI

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107 pp

Questions Presented

Whether the certification of a mandatory state class action pursuant to Rule 23(B)(1) of the Indiana Trial Rules, without any notice to parties litigating the same issues in federal court, without any meaningful hearing in which these federal plaintiffs could object to the class certification, and without a right to opt out of a class wholly for monetary damages, violates the Due Process Clause of the Fourteenth Amendment.

Whether a State trial rule allowing an automatic change of venue violates the Equal Protection Clause of the Fourteenth Amendment, where the rule permits wholesale exclusion of members of racial minorities from sitting on juries called to deliberate about environmental damage occurring within communities in which they predominate, and where no race-neutral reason for the request was required at the time the change of venue was ordered.

List of Parties

The parties to this proceeding are:

Petitioners: Dorthea and Joseph Zrnchik, Diana and Edward Abrego, Anastasha Abrego, Edward Abrego, Jr., Gilbert Abrego, Magda Abrego, Melchor Abrego, Lucilia and Francisco Aguilera, David Aquilera, David C. Aquilera, Jr., Veronica Aquilera, Brian Arteaga, Blanca Banegas, Kelly Benegas, Michael Banegas, Eileen and Peter Beda, Michael Beda, Michelle Beda, Lucille and James Braun, Lorene and Harold Burgan, Stella and Joseph Cook, Brittney Cornelius, Jennifer Cornelius, Dorothy and Carl Davis, Marlene and Raymond Gajewski, Matthew Gajewski, Magda and Pascual Garcia Jr., Aisha Garcia, Deborah and William Harris, Patricia and Paul Heidenthal, Marthan and Ronald Hric, Alisha Hric, Kelly Hric, Oliver Hric, Pauline and Charles Johnson, Lillian Kacak, Diana and Joe Keithly, Margaret Kreevich, Judith and Francis Kubeck, Keith Kubeck, Donna Kusbel, Katherine Kusbel, Janet and Rigorberto Lemus, Nicole Lemus, Michele and Ernest Livingston, David Livingston, Michael Livingston, June and Donald Long, Katherine and Anton Maleckar, Barbara Maleckar, Mildred Maleckar, Spring Maleckar, Paula Maloney, Brian Maloney, Kerry Maloney, Paul Maloney, Beth and Albert Minniti, Leta Minniti, Jacquelyn and John Moore, Daniel del Muro, Elvira del Muro, Juanita del Muro, Luis del Muro, Rolando del Muro, Jennifer and Eric Perez, Catherine Petrak, Martha and Francisco Ponce, David A. Ponce, Francisco Ponce III, Marina and Adrian Rangel, Karen and Phil Rapchak, Charlene and James Simko, Kyle Simko, Elvia and John Slivka, Mary Solcich, Martin Soto, Margie Soto, Vicki Soto, Brian Staley, Christian Staley, Glen Staley, Jr., Elizabeth and Richard Taylor, Janet and George Taylor, Ruby and Cash Tunstall, Marion Wilkening, John Wilkening, Patricia Wilkening, Austin Yale, Wilma and Jerry Young, Carl Young, Kasey Young, Kim Young, Benjamin Zrnchik, Lisa Zrnchik, Stephanie Zrnchik, and William Zrnchick.

Respondent: Amoco Oil Company, a Maryland corporation with its principal place of business in Chicago, Illinois.

Table of Contents

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	1
Summary of Key Procedural Facts	2
Detailed Chronology of Key Procedural Facts	4
Reasons for Granting the Writ	13
1. The Decision Below Departs from this Court's Teaching about Due Process Rights to Adequate Notice, to a Fair and Full Hearing, and to Opt Out of a Mandatory Class Action Wholly for Money Judgments." The Decision Below Is in Direct Conflict with Decisions of Federal Courts of Appeals	15
2. The Court Has Expressed a Continuing Interest in the Issue of a Due Process Right to Opt Out of Class Actions.	18
3. This Case does not Suffer from the Defects that Led the Court to Dismiss the Writ in *Ticor* and in *Adams*	19
4. Amoco Offered No Race-Neutral Reason for its Requested Change of Venue at the Time it was Ordered. The Court Should Invalidate Automatic Change of Venue Rules that Exclude Members of Racial Minorities from Juries Deliberating about Environmental Damage Occurring in Communities in which They Predominate.	23
Conclusion	28

Table of Authorities

Page(s)

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Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 20

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County of Suffolk v. Long Island Lighting Co., 907 F. 2d 1295 (2d Cir. 1990) 9

Crawford-El v. Button, 118 S.Ct. 1584 (1998) 21

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Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 23-24

Healy v. Beer Institute, 491 U.S. 324 (1989) 22

Illinois v. Gates, 462 U.S. 213 (1983) 19

In re Bendectin Products Liability Litigation, 749 F. 2d 300 (6th Cir. 1984) 17

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139 (Ind. App. 1997).....1

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Moore & Richardson v. Kocur, Cause No. 45D05-9101-CT-260 (Lake Co. Sup. Ct., Sept. 18, 1991).....24

Morrison v. State, 542 N.E. 2d 564 (Ind. 1989).....6,21

Morales v. TWA, 504 U.S. 374 (1992).....22

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).....15

Mu'mim v. Virginia, 500 U.S. 415 (1991)..... 26-27

New York v. New Jersey, 118 S.Ct. 1726 (1998).....21

Osmulski v. Becze, 638 N.E. 2d 828 (Ind.Ct.App.1994) 24

Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985)..... 9-11,15-19,21,22

Robertson v. National Basketball Assn., 556 F. 2d 682 (2d Cir. 1977).....17

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Taylor v. State, 507 N.E. 2d 978 (Ind. 1987).....4

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28 U.S.C. § 1257 1

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Rule 201(b), F. R. Evid. 13

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Rule 902(6), F.R. Evid. 2

Indiana Rules cited:

Trial Rule 23 2-6

Trial Rule 53 9

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Index of Appendices

Appendix A: Chronology of Principal Events 1a-6a
Appendix B: Opinion of Supreme Court of Indiana 7a-11a
Appendix C: Opinion of Court of Appeals of Indiana 12a-30a
Appendix D: Order of Newton Circuit Court Certifying a Property Class Under Indiana Rule 23(B)(1) and Notice of Class Action, 1/23/92 ..... 31a-35a
Appendix E: Pre-Trial Orders, Newton Circuit Ct, 4-26-93..... ..... 36a-38a
Appendix F: Order of Newton Circuit Court Denying Motion to Vacate Mandatory Class Certification Order or to Set a Hearing to Reconsider whether Martin Should Continue as a Mandatory Class or an Opt Out Class, 11/23/93 ..... 39a
Appendix G: Final Judgment Order and Judgment on the Verdict, Newton Circuit Court, 12/14/93 ..... 40a-41a
Appendix H: Order of Newton Circuit Court on Intervenors' Motion to Correct Errors, 8/1/94 ..... 42a
Appendix I: Order of Newton Circuit Court on Class Plaintiffs' Motion to Correct Errors, 8/1/94 ..... 43a-44a
Appendix J: Indiana Trial Rule 23. Class Actions 45a-47a
Appendix K: Indiana Trial Rule 75. Venue Requirements 48a
Appendix L: Indiana Trial Rule 76. Change of Venue 49a
Appendix M: Indiana Trial Rule 79. Special Judges 50a-51a
Appendix N: Indiana Appellate Rule 11(B)(3)1 ..... 52a
Appendix O: Population by Race: Lake & Newton County.... 53a
Appendix P: Letter of Frank J. Citek, Manager Amoco Oil Refinery, to Residents of Whiting, 1/23/91 ..... 54a-56a
Appendix Q: "Massive Underground Oil Spill Slowly Spreads from Whiting," *Hammond Times* 1/24/91 .. 57a-61a
Appendix R: News Release of Amoco Oil Co., 6/17/92 . 62a-64a
Appendix S: Table of Contents, Brief for Intervenors in the Court of Appeals of Indiana 65a-66a
Appendix T: Table of Contents, Brief for Intervenors in the Supreme Court of Indiana 67a
Appendix U: Excerpt, Transcript of Fairness Hearing, City of Independence v. Amoco Oil Co., 7/30/98 ..... 68a-69a

Petition for a Writ of Certiorari

Petitioners Dorthea and Joseph Zrnchik, *et al.* (referred to as "federal plaintiffs" or "objectors to mandatory class in state court") respectfully petition for a writ of certiorari to review the constitutionality of the judgment of the Supreme Court of Indiana in this case.

Opinions Below

The opinion of the Supreme Court of Indiana is reported under the name *Martin et al. v. Amoco Oil Company* at 696 N.E. 2d 383 (Ind. 1998). App. 7a-11a. The opinion of the Court of Appeals of Indiana is reported under the name *Martin et al. v. Amoco Oil Company* at 679 N.E. 2d 139 (Ind. App. 1997). App. 12a-30a.

Jurisdiction

The decision of the Supreme Court of Indiana was rendered on June 29, 1998. A timely application was presented to Justice Stevens, as Circuit Justice for the United States Court of Appeals for the Seventh Circuit, for an extension of time, up to October 28, 1998, within which to file this petition. On September 18, 1998, Justice Stevens granted the application. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions Involved

The Fourteenth Amendment to the United States Constitution provides in relevant part: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

As the Supreme Court of Indiana noted succinctly, "These claims originated from a notice from Amoco to the residents [of Whiting, Indiana] which warned of the possibility of underground oil migration onto their properties." App. 7a-8a. In a letter dated January 23, 1991, the manager of Amoco's Whiting refinery wrote to Dorthea and Joseph Zrnchik and hundreds of other residents of Whiting: "Amoco Oil Company has reason to believe that petroleum products beneath its Whiting refinery have moved beyond its property underground.... Amoco is committed to

working with state and local officials to determine the extent of the petroleum underground and developing and implementing a comprehensive plan to remediate the affected area. We also are committed to working to prevent future leaks or spills." App. 54a. The oil company acknowledged that 16.8 million gallons of oil (nearly double the amount of oil involved in the Exxon Valdez spill) had spilled or leaked from the containers at the refinery, and pledged remediation of the contamination.[1]

Summary of Key Procedural Facts

This case began with an admission by the oil company that -- like Tom Hanks in "Apollo 13" – it had "a problem." Litigation ensued. Because the procedural facts of the case are complicated, we set them forth in greater detail below and in a chart (Appendix A). App. 1a-6a. The essential facts of the case relating to the questions presented can be boiled down to five basic themes.

1. A week after the oil company's admission of the spill, on February 1, 1991, two households sued the oil company in an opt-out class action for compensatory damages in state court under Indiana Trial Rule [hereafter T.R.] 23(B)(3), App. 45a-47a, which reads the same as the Rule 23, F.R.Civ. P.

2. On April 24, 1991, the oil company sought to move the state case out of the urban environment in which the oil spill occurred, the population of which is approximately 25% African-American, to a rural county with a population of African-Americans less numerous than .1%. Under the form of T.R. 76 governing this case, the oil company offered no reason whatever for its requested change of venue at the time it was ordered, since such motions were then granted automatically.

3. On June 10, 1991, Hon. Marvin McLaughlin was appointed as special judge in the case, but failed to qualify within the jurisdictional period stated in T.R. 79(5). Nevertheless he took jurisdiction of the case and continued to exercise it.

4. On October 10, 1991, 43 individuals jointly filed an action in federal court under Rule 20, F. R. Civ. P., seeking compensatory damages from the oil company, and joined with it a class action, limited to the issue of punitive damages. On January 7, 1992, the federal plaintiffs clarified that the class action aspect

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[1] *See* "Massive Underground Oil Spill Slowly Spreads from Whiting," *Hammond Times*, Jan. 24, 1991. App. 57a-61a. *See* Rule 902(6), F.R. Evid.

of the lawsuit would be a Rule 23(b)(3) opt-out class. With one exception (Henry Cornelius) noted below, federal plaintiffs are the petitioners here.

5. On January 23, 1992, the attorney for the oil company and the attorney for the state plaintiffs moved to switch the state class action from an opt-out to a mandatory class under Ind. T.R. 23(B)(1), representing to the court that their motion was "unopposed." Judge McLaughlin, despite his evident lack of jurisdiction under state law, immediately granted this motion, entering an order certifying a mandatory class. Once that decision was reached, all attempts by the federal plaintiffs to opt out of the state action were rebuffed by the Indiana courts.

The motions of the oil company and the state plaintiffs for a mandatory class were "unopposed" by the federal plaintiffs on that day for the simple reason that they had no notice of the hearing. If petitioners had received adequate notice, they could have raised several meritorious objections, including: (a) the constitutional violation implicated in the automatic change of venue, (b) the constitutional right to opt out of a class wholly or predominantly for a money judgment, (c) the lack of jurisdiction of the trial judge, and (d) the impropriety of certifying a mandatory class under T.R. 23 (B)(1) on at least two grounds. First, in a case predominantly for damages there is no risk of inconsistent obligations (paying plaintiff A is consistent with paying plaintiff B, if both have suffered injury caused by the defendant). Second, this is not a "limited fund" case (there was no risk of bankrupting the oil company, which had posted profits of $1.6 billion in that fiscal year).

The reason why it is certain on this record that the federal plaintiffs *could* have said these things at the crucial certification hearing from which they were wrongfully excluded is that they *tried* to say these things, over and over again, only to be rejected at every turn by the Indiana state courts, from the trial court to the appellate tribunals. The facts recited above are detailed in the chronology that follows and in the chart provided in Appendix A. App. 1a-6a. But the Court may return to the five points sketched above to focus on the procedures essential to an understanding of the two questions presented here. We refer to petitioners as federal plaintiffs, as objectors to mandatory participation in the state class action, or, in the state appeal, as intervenors.

Detailed Chronology of Key Procedural Facts

On February 1, 1991, three named litigants -- Robert

O'Drobinak, Eugene Burkat, Jr., and Wanda Burkat -- filed a state class action complaint in the Superior Court for Lake County, Indiana. These two households sought "entry of an Order as soon as practicable *after hearing*, pursuant to Rule 23, certifying that this action may be maintained as a class action by the representative plaintiffs.... [and] directing to the members of the class the best notice practicable under the circumstances advising them of their *option to be excluded from the class* and the binding nature of any judgment if not excluded" (emphasis added). The prayer for relief sought compensatory damages and an order preventing Amoco from destroying evidence relevant to the oil spill. It also sought unspecified injunctive relief, a prayer that was subsequently abandoned. Thus the case is "predominantly for money judgments." On April 1, 1991, the state plaintiffs filed an amended complaint, adding two named representatives, James Martin and Mary Roman, to the state class, and preserving the right of class members to opt out of the state class action if they chose to do so.

On April 24, 1991, Amoco filed a motion for change of venue from Lake County. At that time it did not allege any reason whatever for its motion. For example, it offered no evidence of adverse publicity so poisoning the atmosphere that no panel of unbiased jurors could be relied upon to render a fair verdict in the county where the events took place. Amoco did not have to offer any reason for its request because under the form of Ind. T.R. 76 existing at the time, a request for change of venue was granted automatically. The state case was transferred from Lake County (the place where the oil spill occurred, the population of which is approximately 25% African-American) to Newton County (a rural county with a population of African-Americans less numerous than .1%). App. 21a; see also Appendix O (indicating population of Lake and Newton Counties by race), App. 53a.

On June 10, 1991, the Hon. Marvin McLaughlin was appointed special judge. Judge McLaughlin immediately assumed control of the case, but did not file an appearance and qualification as special judge. App. 13a-14a. Under Ind. T.R. 79(5), the failure of a special judge to appear and qualify within twenty days of the appointment "shall revoke the appointment." App. 51a. Under Indiana law the defect is jurisdictional. *Taylor v. State*, 507 N.E. 2d 978 (Ind. 1987), *State v. Smith*, 170 N.E. 2d 423 (Ind. 1960).

On October 10, 1991, 43 individual plaintiffs effectively opted out of the state class action by filing a complaint in the

U.S. District Court for the Northern District of Indiana [hereafter, district court], seeking compensatory damages related to the injuries sustained by the named plaintiffs, all of whom were joined under Rule 20, F. R. Civ. P. These federal plaintiffs (objectors in state court and petitioners here) also sought certification as representative parties to bring a class action solely with respect to punitive damages. The federal complaint sought "an Order as soon as practicable *after hearing*, pursuant to [F. R. Civ. P.] Rule 23(b)(1), certifying this action for punitive damages as a mandatory class action." In the alternative, the federal plaintiffs sought "an Order as soon as practicable *after hearing*, pursuant to Rule 23(b)[3], certifying this action for punitive damages as a class action and directing to the class members adequate notice advising them of their *option to be excluded from the class* and the binding nature of any judgment if not so excluded." (emphasis added). The case was assigned to the Hon. James T. Moody.

On January 7, 1992, the federal plaintiffs moved for determination of the maintenance of a class action -- limited to punitive damages -- as a Rule 23(b)(3) opt-out class.

On January 23, 1992, the four state plaintiffs (James Martin, Mary Roman, Eugene Burkat, Jr., and Wanda Burkat) and Amoco both filed motions in state court to certify the class as a *mandatory class* under Ind. T.R. 23(B)(1). Counsel for the state plaintiffs switched from a 23(B)(3) opt-out class to a 23(B)(1) mandatory class at the suggestion of counsel for the oil company. On the same day the motions were filed, *with no notice to the federal plaintiffs or opportunity to be heard*, Judge McLaughlin conducted a telephone conference[2] with the lawyers for the state plaintiffs and for Amoco, and immediately entered an order -- conveniently prepared by the oil company -- certifying the class as a T.R. 23(B)(1) mandatory class. App. 14a, 31a-35a. The oil company also prepared a Notice of Class Action accompanying

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[2] In the informal telephone conference both the counsel for the state plaintiffs and the counsel for Amoco represented to Judge McLaughlin that their motions were "unopposed." The reliability of this statement turns on whether the due process clause requires pre-certification notice to potential objectors. The federal plaintiffs had no notice that the motions were filed, and hence had no opportunity to be heard in the crucial "hearing" at which the motions were acted upon, the same day they were filed. The federal plaintiffs could not have anticipated this decision to deny them an opportunity to be excluded from the state class action, since the pleadings of the state plaintiffs up to that moment had sought an opt-out class.

this order, App. 33a-35a, and promptly hand delivered this notice of a fait accompli to the residents of Whiting living adjacent to the refinery.

On January 28, 1992, Amoco then went into the district court to seek from Judge Moody a stay of the federal proceedings on the ground that the state court had "certified a no opt-out class under Rule 23(b)(1) that includes all the proposed class members in this case and all the claims raised in this case."

On February 3, 1992, the objectors filed a motion in state court to strike or to vacate the order of a mandatory class on one simple ground: the jurisdictional defect about the failure of Judge McLaughlin to qualify under Ind. T.R. 79(5). App. 51a. Under State law, objectors were required to refrain from making a challenge on any other issue, such as the due process or equal protection claims or the impropriety of the class certification under T.R. 23, at the risk of waiving any objection to the court's jurisdiction. *Thomas v. State*, 656 N.E. 2d 819 (Ind. 1995); *Morrison v. State*, 542 N.E. 2d 564, 570 (Ind. 1989).

On February 14, 1992, the federal plaintiffs (now numbering 90 named individuals) filed an amended complaint in the district court, adding two new causes of action, a state unjust enrichment claim, and a federal claim arising under the Comprehensive Environmental Response, Compensation and Liability Act [hereafter CERCLA], 42 U.S.C. § 9601. In this complaint, the federal plaintiffs again sought certification of a class for punitive damages under F.R.Civ. P. 23(b)(3), allowing potential class members adequate notice of their right to opt out of the class.

On March 6, 1992, the federal plaintiffs filed in state court a 33-page memorandum of law in support of their motion to vacate the order certifying the mandatory class. Again, this memorandum focused exclusively on Judge McLaughlin's lack of personal jurisdiction in the case, and sought his revocation under the clear terms of T.R. 79(5). App. 51a. The memorandum clarified that under Indiana law the defect is jurisdictional. It also noted that under Indiana law new parties to an action may object to the lack of jurisdiction of a special judge when they are first brought into the action. *State ex rel. York v. Newton Circuit Court*, 531 N.E. 2d 198 (Ind. 1988), *State ex rel. Rabel v. Jasper Superior Court*, 467 N.E. 2d 693 (Ind. 1984), and *Walb v. Eshelman*, 94 N.E. 566 (Ind. 1911). Indeed, under *Thomas, supra*, and *Morrison, supra*, they must do so before proceeding further in the case or else waive this objection. State law, moreover, requires a mo-

tion to revoke the appointment of a special judge to be heard not by that special judge, but by the Chief Judge. *Stephen v. State*, 193 N.E. 375 (Ind. 1933).

On March 18, 1992, ignoring *Stephen*, Judge McLaughlin ruled on the motion challenging his jurisdiction, denying the objectors' motion for his removal from the case on the ground that he had failed to appear and qualify within the jurisdictional period. Judge McLaughlin offered two reasons for this ruling. First, the federal plaintiffs "are not such parties as can file motions for change of judge or attack the authority of the Special Judge." Second, he found the specific requirements of Ind. T.R. 79(5) to be "useless."

On March 25, 1992, the federal plaintiffs filed a praecipe (the Indiana equivalent of the notice of appeal in federal practice, *see* Rule 3, F.R. App. P.) to seek a writ of prohibition challenging of Judge McLaughlin's jurisdiction. The federal plaintiffs had not yet filed any motions based on their objections to the propriety of a mandatory class under T.R.23(B)(1) or based on their federal constitutional claims of denial of due process. As discussed below, these challenges would follow on June 5, but were not yet before the state court. The only order on file at this stage of the litigation in State court, and thus *the only possible basis for the filing of th praecipe was the judge's order finding the jurisdictional limit on his power "useless."* For strategic reasons the federal plaintiffs decided not to pursue a direct appeal on this matter, and thus did not file the record with the Supreme Court of Indiana.

On March 26, 1992, in an unreported opinion Judge Moody granted -- over the strenuous objections of the oil company -- the federal plaintiffs' motion under Fed. R. Civ. P. 15(a) to file an amended complaint. *Braun v. Amoco Oil Company*, Civ. No. H91-360 (N.D. Ind. Mar. 26, 1992), at 1-5. Specifically, the district court allowed the federal plaintiffs to add a federal cause of action under CERCLA, noting that under 42 U.S.C. § 9613(b) it has exclusive jurisdiction over the CERCLA claim. *Id.* at 8-9. The Court also denied Amoco's motion for a stay of the federal proceedings on grounds that the parallel state-court litigation was under way. *Id.* at 5-10. The district court also questioned "the ability of the state court proceedings to adequately protect the rights and interests of all of the plaintiffs in this federal action," *id.* at 9: "The *Martin* class appears to be the same as the proposed class in this action, but, in fact, the persons within the class who filed the state action are not the same persons who filed this ac-

tion, and the [4] named plaintiffs in *Martin* are substantially less in number than those in this case [90]. Moreover there is a dispute among the parties in this action as to whether the certified class in *Martin* is in fact valid and sufficiently broad to include all of the members of the proposed class in this action." *Id.* at 9-10.

On June 5, 1992, the federal plaintiffs filed a motion in state court for leave to opt out of the mandatory class action, offering several grounds for doing so: (1) lack of pre-certification *notice*, (2) lack of meaningful *hearing* to consider the propriety of certifying a mandatory class on the facts of this case, (3) the *constitutional right to opt out* of a class action predominantly for money judgments, and (4) *fundamental fairness* to litigants and judicial economy (federal plaintiffs should not be required to engage in litigation on same issues both in state and in federal court); Judge McLaughlin took the motion under advisement.

After conducting a groundwater investigation, Amoco issued a news release on June 17, 1992, repeating the statistic that 16.8 million gallons of petroleum hydrocarbons had leaked to the ground under the refinery, but claiming that only about 25,000 to 50,000 gallons had "migrated past the refinery's western barrier system into limited portions of the residential area adjacent to the refinery." App. 62a. According to the oil company, the underground oil was confined to "isolated pockets along First Street, right up next to the refinery's well-point system, and along the refinery's unused utility corridor near 126th Street." App. 62a.

With no response to its motion to opt out, the objectors then filed an alternative motion in state court on June 22, 1992, seeking to intervene for purposes of establishing a subclass of property owners within the zone acknowledged by Amoco in its June 17 press release to be contaminated by the oil spill. The objectors argued that the state class representatives failed the typicality requirement since none of them lived within the admittedly contaminated zone in Whiting. They suggested that Amoco could (and later did at trial) introduce evidence from its groundwater investigation supporting the claim that the representatives do not even have oil under their property. They also urged that the state class representatives did not meet the requirement of adequately protecting and representing the interests of the class, noting that none of the representatives ever testified in a hearing or a deposition that he or she was able or willing to assume the fiduciary obligations of class representatives. The objectors noted that four federal plaintiffs (Dorthea and Joseph Zrnchik, Henry Cornelius,

and Marion Wilkening) live within the zone acknowledged by Amoco to be contaminated, and that they fully understand and are willing to undertake the responsibilities of class representatives.

On June 24, 1992, the federal plaintiffs filed a 28-page memorandum in support of their earlier motion to opt out of the mandatory class action, upon which no action had yet been taken. In this memorandum the objectors made plain that they had "been made parties to a mandatory class action against their will and without any notice and opportunity to object." The objectors relied expressly on this Court's teaching in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) concerning the right to opt out of a class "wholly or predominately for money judgments." *Id.* at 811, n. 3. In addition, the objectors urged that the intense discovery schedule[3] in the federal case constituted a separate ground requiring that they be allowed to opt out of the state case to be able to focus their efforts on the federal case, citing and discussing relevant federal case law, including *County of Suffolk v. Long Island Lighting Co.*, 907 F. 2d 1295 (2d Cir. 1990). On the same day this memorandum was filed, Judge McLaughlin denied the objectors' motion of June 5, in an Order dealing with this momentous issue in one sentence: "The Court overrules all Motions to Opt Out of Class." *See also* App. 39a (Judge Smart's single sentence post-trial ruling to same effect).

On August 27, 1992, the objectors filed a Motion to Set Aside and Vacate Mandatory Class Certification Order, or, In the Alternative, to Set a Hearing to Reconsider Whether Martin Should Continue as a Mandatory Class or an Opt Out Class. Judge McLaughlin postponed consideration of this motion.

After the state plaintiffs sought an order under T.R. 53.4 denying the objectors' motion as "repetitive," the objectors filed a response on September 15, 1992, clarifying that the court had never ruled on any of the 7 independent arguments on the fundamental constitutional issues they raised. On the same day Judge McLaughlin entered a hand written order assigning the objectors' motion to vacate the mandatory class "for hearing at the pretrial 2-5-93."

On the same day Judge Moody granted the motion of the federal plaintiffs for an extension of time in which to complete

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[3] In response to requests for admissions and other interrogatories, Amoco deposited with counsel for petitioners 85 large boxes of documents. Amoco scheduled depositions of 23 individual federal plaintiffs in June and 10 in July.

discovery, and he set a date of November 1, 1993, for a trial in the district court.

On October 29, 1992, the objectors filed another memorandum in state court in support of their motion to set aside the order certifying a mandatory class. Amoco attacked this motion as raising "the same objections that the court has already rejected." The objectors replied that "not one [of the arguments regarding the propriety of the mandatory class] has ever been formally raised or formally ruled upon by this court." The objectors noted that "every court to have ever addressed the situation posed by this class -- namely certification of a mandatory class without pre-certification notice to absent class members -- has vacated the mandatory class certification." Judge McLaughlin again postponed consideration of the motion that these arguments supported.

On March 5, 1993 the federal plaintiffs filed a supplemental petition in state court to intervene to establish a subclass of Whiting residents living within the zone admitted by Amoco to be contaminated. The state plaintiffs filed an opposition to this petition on March 19.

On April 26, 1993 Judge McLaughlin ruled as follows: "The Court overrules any pending 'opt-out' motions and orders that none shall be refiled as these have been heard on numerous occasions." He then "opted out" of the state case, recusing himself without explanation. The Hon. Robert Smart was substituted as special judge and duly qualified within the jurisdictional period.

On June 2, 1993, the state plaintiffs withdrew their objection to the intervention of one of the federal plaintiffs (Henry Cornelius), while "continuing to maintain their objections to the intervention of the other [federal plaintiffs] .. and their objection to the creation of a subclass."

At a status conference on June 24, 1993, the *state plaintiffs withdrew their prayer for injunctive relief.* Judge Smart granted the state plaintiffs' motion to substitute former federal plaintiff Henry Cornelius in the place of Eugene Burkat, Jr. and Wanda Burkat. Five points merit emphasis. First, the state case was henceforth "wholly ... for a money judgment," *Shutts, supra.* Second, Cornelius lives within the geographical area that Amoco admitted to be contaminated after completion of its testing of the ground soil; none of the other named plaintiffs in the state class action do. Third, after Cornelius joined the state class as a named representative, he withdrew from the federal case, and is not a

petitioner in this Court. Fourth, none of the other federal plaintiffs ever participated in the state case other than as strenuous objectors to mandatory inclusion in those proceedings. App. 13a, n. 1. On the same day, Judge Smart granted the motion of the objectors to withdraw their pending motion to establish subclasses. Fifth, at the request of counsel for the state plaintiffs and after discovery had closed in the state case, Richard Komyatte, lead counsel for the objectors, agreed to assist in the state case as co-counsel, but all federal plaintiffs -- with the exception of Cornelius (not a petitioner here) -- objected continuously to coerced participation in the mandatory state class.

On August 9, 1993, objectors asked Judge Smart to reconsider Judge McLaughlin's denial of their motion to opt out. In light of the fact that all parties agreed that the case now focused *solely on money damages*, the federal plaintiffs again urged that *Shutts, supra*, protected their right to opt out *instanter*. Judge Smart denied this motion on August 11, but later reserved ruling on the opt-out issue to a post-trial hearing. App. 39a.

The state plaintiffs began their case-in-chief on October 8, 1993. At the conclusion of the evidence, this matter was submitted to the jury on November 22, 1993. On that day, while the jury was deliberating, the objectors renewed their motion of August 27, 1992, to opt out of this class. App. 16a. On November 23, Judge Smart ruled against the objectors on this issue in a single sentence denying a hearing to reconsider whether the state case should continue as a mandatory class or an opt out class. App. 39a.

On November 29, 1993, the jury rendered verdicts in favor of Amoco and against the state plaintiffs on all counts. App. 16a. On December 14, 1993, Judge Smart entered a Final Judgment Order and Judgment on the Verdict. App. 16a, 40a. On the same day the objectors filed a motion for leave to intervene for purposes of filing a motion to correct errors and/or for purposes of filing an appeal. Judge Smart granted this motion on January 13, 1994, and on the same day, the objectors (now known as "intervenors") filed a motion to correct errors, again objecting to the denial of due process (lack of notice and hearing, and no opt-out) and of equal protection (automatic change of venue) in the state case. On March 21, 1994, Judge Smart held a hearing on the objectors' motion to correct errors.

On June 6, 1994, Judge Moody granted summary judgment on the CERCLA claim to the federal plaintiffs, and he stayed the federal trial pending the outcome of the state proceedings, in-

cluding the appeals. App. 8a, 14a.

On August 1, 1994, Judge Smart denied the motion of the objectors/intervenors' to correct errors. On August 31, 1994, the objectors/intervenors timely filed their praecipe with the Newton Circuit Court. In the appeal that followed before the Indiana Court of Appeals and the Supreme Court of Indiana, petitioners adequately presented their federal claims in their briefs. App. 65a-67a. Specifically, the objectors/intervenors argued that the failure to provide pre-certification notice, the failure to provide a meaningful hearing on the determination of a mandatory class, and the failure to allow the objectors to opt out of a class for monetary damages, constitute three distinct violations of the Due Process Clause of the Fourteenth Amendment. *Brief of the Intervenors*, 23-35. Petitioners also argued that "the transfer of this action from Lake to Newton County under former Indiana Trial Rule 76 constituted a wholesale peremptory challenge to any black juror and violated the equal protection clause." *Id.* at 45-47. In addition, the objectors briefed and argued two state law claims: (1) that certification of a mass tort class as a mandatory class was improper under Indiana T.R. 23, *id.* at 14-22, and (2) that Judge McLaughlin's appointment as special judge was revoked when he failed to comply with the jurisdictional requirements of Ind.T.R. 79, *id.* at 35-45. App. 66a-67a.

The courts below ruled that the objectors waived their right to appeal the propriety of the certification of a mandatory class for failure to file a praecipe within 30 days after the date when the trial court entered a final order on this matter. App. 8a-9a. Although neither court specifies when that order became final, the most sensible conclusion that can be drawn from their opinions is that the date in question is January 23, 1992, when Judge McLaughlin certified the mandatory class. App. 8a, 14a. Viewing the challenge to Judge McLaughlin's jurisdiction as a technical means of attacking the class certification, the Court of Appeals ruled that the objectors had waived their right to attack the certification on this basis as well. App. 19a-20a. The Court of Appeals ruled in a single sentence that "Intervenors' challenge to the propriety of the class *and their due process challenge* of the class were waived." App. 20a. The lower court, however, did not discuss the contentions of the objectors that their federal due process rights were violated by the lack of pre-certification notice and hearing and by the denial of their right to opt out of a class action wholly for a money judgment.

The Supreme Court of Indiana granted a petition to transfer

this case from the Court of Appeals. Though briefed fully on the federal questions presented here, App. 67a, the Supreme Court of Indiana did not discuss these questions. Instead, it focused narrowly on "whether an order certifying a class action is interlocutory in nature or final upon entry and thus appealable as of right." App. 7a. The Supreme Court did not vacate the other portions of the opinion of the Court of Appeals of Indiana, App. 12a-30a, but summarily affirmed these portions of the lower court's opinion. App. 11a. *See* Ind.App. Rule 11(B)(3), discussed in note 4 of the Supreme Court's opinion. App. 11a. In the event that this Court finds that the writ should issue to the Court of Appeals of Indiana, petitioners request that the petition be construed accordingly.

Reasons for Granting the Writ

The respondent oil company recently settled (for over $7.6 million) claims of damages to the property of residents of Independence, Missouri, arising from a similar oil spill from an Amoco refinery in Sugar Creek, Missouri. The lead counsel for Amoco both in that case and in this case appears to have acknowledged belatedly the seriousness of the injury suffered by property owners in Whiting, Indiana as a result of the oil spill. On July 30, 1998, he stated in a fairness hearing in federal court on a settlement of claims in the Sugar Creek case that the situation in "Whiting is worse": "the contamination in Sugar Creek is at very low levels. It is dissolved and it is in the groundwater and in Sugar Creek the groundwater runs as deep as 60 feet. It is not near the houses. Now, it does vary. But contrast that with Whiting, Indiana, where it's on Lake Michigan. The level of the water in Whiting can be two feet, three feet, four feet, and in fact in Whiting, there was at various times contamination that went into some of the residents' basements, and Amoco went in and remediated that. I compare that because in Sugar Creek, the situation is far different than it was in Whiting. Whiting is worse." Tr. of Fairness Hearing, *City of Independence v. Amoco Oil Co.*, Civ. No. 95-0019-CV-W-2 (W.D. Mo., July 30, 1998). App. 69a.[4]

Once litigation commenced, Amoco's commitment "to prevent future leaks or spills," App. 54a, turned into a denial that

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[4] This statement is directly relevant to this case, and has two separate indicia of credibility. It is a party admission by counsel for the oil company, Rule 801(d)(2), F. R. Evid.; and it is a statement by an "officer of the court" contained within an official court record, Rule 201 (b), F. R. Evid. A certified copy of the transcript is on file with the Clerk of this Court.

any "leak" or "spill"[5] had occurred, accompanied by the view that the oil company had no liability whatever for the event, if it ever happened. Only after seven years of costly litigation culminated in victory for the oil company in the Supreme Court of Indiana on procedural grounds did the lead counsel for the oil company admit what he had previously denied, that "Whiting is worse." These seemingly small, but significant, shifts in this litigation illustrate an initial reason for granting the writ. This Court should address recurrent difficulties about the abuse of the class action by defendants to keep deserving claimants from reaching the merits of their claims in a forum of their choice. *See, e.g. Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992); *and see* Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 836 (1997) (describing "accusations of collusion, attorney self-interest, and judicial acquiescence in or support of unfair settlements"); Susan Konaik, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995) (documenting "improper manipulation of the class definition to benefit the defendants and class counsel"); and Howard Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 661-67 (1994) (illustrating financial conflicts between class counsel and class members), and *id.* at 671-82 (weakening of notice rights).

In *Amchem Products, Inc., et al. v. George Windsor et al.*, 117 S.Ct. 2231 (1997) (mass asbestos class settlement did not satisfy Rule 23 requirements of common issue predominance and adequacy of representation) this Court focused on two difficulties that arise in multidistrict class action litigation under federal Rule 23. Petitioners raised similar concerns in their frequently repeated objections to the certification of a mandatory class in state court.

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[5] The complaint filed by the federal plaintiffs in the district court described the object of the litigation as "a massive underground spill of oil, petroleum products, and other hazardous and ultra-hazardous chemicals which Amoco Oil Company has negligently and intentionally allowed to accumulate through leaks and spills at the Amoco Oil Whiting Refinery over a large number of years." Once Amoco adopted a litigation posture, it insisted in the discovery process upon the "non-pejorative term 'nderground oil' rather than 'oil spill.'" In deference to the etiquette of the oil company, neither of the decisions below uses the word "leak" or "spill." The polite discourse is "alleged oil migration." App. 8a, or "possible underground migration of oil." For a description of the noxious effects of this "migration" on the residents of Whiting, see App. 57a.

Dismissed by the Court of Appeals as "multiple minor motions," App. 14a, these objections became all the more cogent after it became clear that the only relief sought by the state plaintiffs was damages. Whether the requirements of Ind. T.R. 23(B)(1) were met in this instance is a state law matter not resolved under *Amchem* or presented here. What is raised here as a federal due process matter is that the Indiana courts may not reach the conclusion they did here without affording (1) adequate notice *before* deprivation of a liberty clarified by this Court, (2) a hearing commensurate with the deprivation of liberty suffered without a hearing, *Mathews v. Eldrige*, 424 U.S. 319, 339-50 (1976), and (3) a right to opt out of a mandatory class that -- as in *Shutts* -- was "wholly or predominately for money judgments." This case illustrates, moreover, not only the danger of *mandatory inclusion of objectors in a class action*, but also the evil of *mandatory, wholesale exclusion of members of racial minorities* from juries called to deliberate about environmental damage occurring in communities in which they predominate. We discuss the first question presented in §§ 1-3, and the second question in § 4 below.

1. The Decision Below Departs from this Court's Teaching about Due Process Rights to Adequate Notice, to a Fair and Full Hearing, and to Opt Out of a Mandatory Class Action Wholly for Money Judgments." The Decision Below Is in Direct Conflict with Decisions of Federal Courts of Appeals.

A. Petitioners raised below and adequately preserved throughout all stages of the litigation three issues relating to the violation of their due process rights: (1) lack of notice before the determination of a mandatory class, (2) lack of any meaningful hearing on this issue, and (3) denial of the right to opt out of a mandatory class action that was predominantly for a money judgment.

1. Relying on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), petitioners objected immediately and repeatedly to the denial of their due process right to adequate notice before the certification of this potential class. In the Court of Appeals petitioners argued that "the right to be heard has little value unless one is informed of the matter pending. *Mullane*, 339 U.S. at 314. While actual notice is not required in every case, an elementary requirement of due process is notice that is reasonably calculated, under the circumstances, to apprise the interested

parties of the pendency of the action and afford them an opportunity to present their objections. *Id.* In this case, no notice to any putative class member was even attempted." Brief of the Intervenors at 23-24. This case presents the question whether, under the circumstances such as those found in *Shutts* and in this case, the due process clause still requires what this Court said it did in *Shutts*: that "a *fully descriptive notice* [be] sent to each member of a class action with a *clear explanation of the right to opt out of the class*." 472 U.S. at 798 (emphasis added).

2. Petitioners likewise objected immediately and repeatedly to the failure of the trial court to conduct a meaningful hearing regarding the mandatory class certification. Again, petitioners preserved this issue and argued it in the Court of Appeals: "the Due Process Clause, at a minimum, requires that a court provide a party with an opportunity to be heard prior to the deprivation of life, liberty, or property" citing *Mullane*, 339 U.S. at 313. *See also Mathews v. Eldridge, supra.*

3. Petitioners also objected immediately and repeatedly to the failure of the trial court to allow them to opt out of the mandatory state class action. In *Shutts* the Court held that a state class action procedure comports with the Due Process Clause of the Fourteenth Amendment where it requires that a fully descriptive notice be sent by first-class mail to each member of a class action with a clear explanation of the right to opt out of the class. 472 U.S. at 812. Petitioners have little to show for seven long years of litigation seemingly calculated to frustrate their effective access to the federal forum of their choice by wearing down their resources in a mandatory state class actrion that they wanted no part in. This result alone might counsel in favor of a clearer rule requiring class members to "opt in." Nevertheless, petitioners do not renew the argument, rejected in *Shutts*, *id.* at 811, that the Due Process Clause requires each class member to consent affirmatively to his inclusion within the class. Petitioners are content with the Court's view in *Shutts* that "If ... the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to 'opt out.'" *Id.* at 813. They present the due process question in this petition because the courts below departed from *Shutts* by failing to honor their manifest desire to opt out of a state class action "wholly or predominately for money judgments." *Id.* at 812, n. 3.

The first and most obvious manifestation of the objectors'

desire to opt out was the filing of a separate action under Rule 20, F.R.Civ. P., in the district court. This fact alone "provides evidence that some class members have an interest in controlling the course of litigation involving their rights." Jack Friedenthal, Mary Kay Kane, and Arthur R. Miller, CIVIL PROCEDURE 736 (2d ed. 1993). At the time this action was filed, moreover, the state class plaintiffs had only sought certification of an opt-out class. The attorney for Amoco requested the attorney for the state class plaintiffs to change his opt-out class to a mandatory class. A state judge without proper jurisdiction then arranged a telephone conference call with these two attorneys, who told the judge their motions were "unopposed" although the federal plaintiffs received no notice before the certification "hearing." Thereafter, the objectors -- with one exception (Henry Cornelius) -- persistently objected to their inclusion in the mandatory class and repeatedly pressed their constitutional right to opt out of a class action seeking damages. *See, e.g.*, John Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1382-84 (1995) (describing mandatory classes as "probably the most aggressive tactic" to protect "defendants against the 'anger' that high stakes individual claimants, dissatisfied with the terms of the settlement class, will opt out"). The decision in *Martin* departs from the teaching of this Court on *Shutts*.

B. The decision in *Martin* is in direct conflict with federal courts of appeal on two important federal questions, (1) the notice requirement and (2) the duty to afford a right to opt out of actions for money damages.

1. A party may lose a right to opt out of a mandatory class under Rule 23(b)(1), where notice and opportunity to be heard is given *before* the certification of the mandatory class. *See, e.g., Robertson v. National Basketball Assn.*, 556 F. 2d 682 (2d Cir. 1977). By the same token, the failure to provide adequate notice is fatal. *In re Temple*, 851 F. 2d 1269 (11th Cir. 1988) (district court's failure to notify plaintiffs of certification hearing violated due process, and authorized a writ of mandamus to require district court to vacate its order certifying a mandatory class action); *see also In re Bendectin Products Liability Litigation*, 749 F. 2d 300, 306 (6th Cir. 1984) (no opportunity for objectors to dispute whether there was a limited fund); and *In re N. Dist. of Cal., Dalkon Shield IUD Products Liability Litigation*, 693 F. 2d 847, 857 (9th Cir. 1982) (error for court to certify nationwide 23(b)(1)(B) class for punitive damages without giving objectors wishing to pursue remedies in state courts an opportunity to participate in *prior* briefings and hearings). The Indiana trial court was fully

briefed on the federal violation posed by the failure to provide petitioners with notice prior to the crucial certification "hearing" (if a phone call between two lawyers and a judge can so be decribed), but never corrected this fatal error. Also fully briefed on the federal claims, App. 65a-67a, the Indiana appellate courts affirmed that result. This case thus presents a direct conflict between the highest tribunal of a State and the Second, Sixth, Ninth, and Eleventh Circuits.

2. Expanding on this Court's teaching in *Shutts*, the Ninth Circuit held in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed*, 511 U.S. 117 (1994), that class members have a due process right to opt out of a class action asserting significant monetary claims, even when conjoined with injunctive relief. 982 F. 2d at 392. The Indiana trial court was fully briefed on the *Shutts* issue, but denied petitioners' due process right to opt out of a class action *wholly for money damages*. Also fully briefed on the federal claims, App. 65a-67a, the Indiana appellate courts affirmed that result. This case thus presents a direct conflict between the highest tribunal of a State and the Ninth Circuit. The Court should resolve these direct conflicts.

2. The Court Has Expressed a Continuing Interest in the Issue of a Due Process Right to Opt of Class Actions.

Twice within the past four years, the Court has granted certiorari on a question similar to the first question presented here, only to dismiss the writ as improvidently granted. In *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994), the Court granted certiorari on the following question: "Whether a federal court may refuse to enforce the judgment in a nationwide class action certified under Rule 23(b)(1) and (b)(2) on the ground that unnamed class members have a constitutional right to opt out of any class action asserting monetary claims." Brief for Pet. at i.

More recently, the Court granted certiorari in *Adams v. Robertson and Liberty National Life Ins. Co.*, 520 U.S. 83 (1997), involving state class action rules failing to provide for an opt out, on the question: "Whether the certification and settlement of this nationwide class action pursuant to Rules 23(b)(2), 23(b)(1)(A), and 23(b)(1)(B) of the Alabama Rules of Civil Procedure, with no right to opt out, violate the Due Process Clause of the Fourteenth Amendment when all class members suffered individual monetary damages but the vast majority of class mem-

bers receive no monetary compensation for the release of their claims for compensatory and punitive damages." Pet. for Cert., at i.

These grants of certiorari reflect an interest by the Court in a recurrent issue of national importance. *See, e.g.*, Stephen J. Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. 263. If, after *Ticor* and *Adams*, this case seems like "deja vu all over again," petitioners urge that the third time the Court has an opportunity to review *Shutts* should be a charm rather than a strike-out. Just as the Court on occasion overcomes suggestions of mootness to resolve critical issues "capable of repetition yet evading review," *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), so also the Court should not be overly hesitant in waiting for a perfect vehicle with which to address the confusion in lower courts over due process requirements in class actions. *See* Linda S. Mullenix, *Getting to Shutts*, 46 U. KAN. L. REV. 727, 730 (1998) (attorneys seeking to resolve class actions through the mandatory class procedure, especially mass tort litigation, need definitive resolution of the issue left open in *Shutts)*.

3. This Case does not Suffer from the Defects that Led the Court to Dismiss the Writ in *Ticor* and in *Adams*.

Petitioners understand that the Court's continuing interest in an issue, by itself, does not constitute a ground for granting the writ if there are other defects in a particular case. By "adher[ing] scrupulously to the customary limitations on [the Court's] discretion" regardless of the significance of the underlying issue, the Court "promote[s] respect ... for [its] adjudicatory process." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). For example, the writ may be denied or dismissed as improvidently granted to protect the interest of comity between the federal and state courts, and to protect the value of a fully developed factual and legal record, *see, e.g., Adams*, 117 S.Ct. at 1032. This case does not suffer from the defect later leading the Court to dismiss the writ as improvidently granted in *Ticor* and *Adams*.

A. *Hypothetical question*. In *Ticor*, the Court dismissed the writ on the ground that "deciding this case would require [the Court] to resolve a constitutional question that may be entirely hypothetical." 511 U.S. at 118. Three members of the Court were of the view that "[u]nless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and 23(b)(2) notwithstanding the presence of damages claims; the

constitutional opt-out right announced by the court below will be implicated in every such action, at least in the Ninth Circuit." *Id.* at 124-25 (O'Connor, J., dissenting). However the situation in *Ticor* is to be characterized, the repeated efforts of petitioners to opt out show that the question presented here is not hypothetical.

B. *Adequate presentation of federal claim.* In *Adams*, the Court dismissed the writ on the ground that the petitioner's federal claim was not addressed by or properly presented to the Alabama Supreme Court that had rendered the decision to be reviewed. Petitioners in *Adams* had cited a relevant case in their brief before the state Supreme Court; this portion of the brief, however, did not assert a general challenge to the state's class action rules based on the Fourteenth Amendment, but focused only on the narrow question whether *nonresident* members of class were afforded due process. *Adams*, 117 S.Ct at 1029. That particular focus is absent from this record, which deals with *in-state* objectors who wish to proceed in federal court rather than in state court. Petitioners here, moreover, clearly briefed and argued to the Indiana Court of Appeals and to the Supreme Court of Indiana a federal due process challenge to state class action rules that did not afford right to opt out of a class action wholly for damages. App. 65a-67a. Thus this case fully meets the requirements that a "state court had fair opportunity to address the federal question sought to be presented," *Webb v. Webb*, 451 U.S. 493, 501 (1981), and that "the claim was raised 'at the time and in the manner required by the state law,'" *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (citing *Webb*).

C. *Waiver.* As noted above, the objectors challenged the certification of the order of a mandatory class as improper under Indiana T.R. Rule 23(b)(1), App. 8a. The courts below ruled that the objectors waived their right to appeal the propriety of the certification of a mandatory class for failure to file a praecipe within 30 days after the date (unspecified below) when the trial court entered a final order on this matter. App. 8a, 18a-20a. To reach this conclusion, the courts below mistakenly adopted the unfounded speculation of the oil company, Brief of Amoco Oil Company in Opposition to Intervenors' Appeal, at 14-19, that the purpose of the praecipe filed on March 25, 1992, was to seek an appellate determination on the legitimacy of the class certification. Thus the Supreme Court wrote: "On March 25, 1992, Komyatte's clients filed a praecipe with the trial court clerk, ostensibly to appeal the class certification order, but they did not file the record with the Court of Appeals or otherwise pursue the appeal. Instead, they apparently chose to participate in the litigation

as members of the class." App. 8a, 14a. Normally this Court is deferential to state court determinations of state law issues. But the Court is not bound by conclusory assertions for which there is no support whatever in the record. *See, e.g., Bousley v. United States*, 118 S.Ct. 1604, 1612 (1988); and *Crawford-El v. Button*, 118 S.Ct. 1584, 1602 (1998) (Rehnquist, C.J., dissenting). And litigants in this Court may also rely on this rule to attack "findings" for which there is no evidence in the record. *See, e.g., New York v. New Jersey*, 118 S.Ct. 1726, 1736 (1998).

There is no basis in the record for the assertion that the "ostensible" purpose of the praecipe filed on March 25 was to challenge the certification order. The only order on file as to which a timely filing of a praecipe could be had at that time was Judge McLaughlin's order finding the explicit provision of a jurisdictional rule, T.R. 79(5) to be "useless." Under state law, moreover, objection to the personal jurisdiction of a special judge must be made on that basis alone, or else it is waived. *Thomas v. State*, 656 N.E. 2d 819 (Ind. 1995); *Morrison v. State*, 542 N.E. 2d 564, 570 (Ind. 1989). For that reason petitioners refrained from making a challenge on any other issue, such as the due process or equal protection claims or the impropriety of the class certification under T.R. 23, until the chief judge had ruled on Judge McLaughlin's jurisdiction. Hence the filing of the first praecipe could not conceivably have been to appeal on the lack of notice or hearing or the due process right to opt out protected in *Shutts*, for the obvious reason that petitioners had not yet asserted those rights and thus there was no final order on those issues from which to take an appeal. *The only ruling on class certification was Judge McLaughlin's order of January 23, 1992*, which is defective for want of adequate notice to the federal plaintiffs. On February 3, 1992, the federal plaintiffs filed a motion to vacate that order, exclusively on the ground that Judge McLaughlin was without any power to enter any orders in the case since he had not qualified within the jurisdictional period reflected in Ind. T.R. 79(6). Ignoring the requirement that another judge rule on this matter, Judge McLaughlin denied the objectors' motion with respect to his jurisdiction on March 18. This was the *only order on file* and thus was the *only possible ground for an interlocutory appeal* at that point. By the same token, the personal jurisdiction of the special judge is the *only issue* that was waived when the appeal was not perfected after the filing of the first praecipe.

The notion that petitioners "apparently chose to participate in the litigation as members of the [state] class," App. 8a, likewise has no basis in the facts of this record. Of the 90 federal

plaintiffs, only Henry Cornelius chose to participate in the state proceedings, and he is not a petitioner here. *See* List of Parties, ii. All the other federal plaintiffs continuously objected to inclusion in the state class action and continuously sought to exercise their opt-out right secured in *Shutts*.

The Court of Appeals mistakenly lumped together the objectors' challenge to certification of the mandatory class with their due process rights: "Intervenors' challenge to the propriety of the class *and their due process challenge* of the class were waived." App. 20a. Petitioners concede that they waived their right to appeal the state law issue of the validity of the construction of Ind. T.R. 23 in the certifying the mandatory class in *Martin*. The law of the case now holds that "an [Indiana] order certifying a class action is interlocutory in nature" and not "final upon entry and thus appealable as of right." App. 7a. Under state law applicable at the time of the entry of the order of certification of the class (a date that on this confused record neither of the courts below cared to specify) "class certification orders were final and appealable."App. 8a.

This petition, however, does not deal with that issue of state law, but with the violation of the Fourteenth Amendment when the Indiana courts authorized a deprivation of petitioners' liberty and property interests without adequate notice, a fair and full hearing, and a right to opt out. Petitioners never waived any of these three rights. It is a wild stretch of the imagination -- not "harmless error" -- to suggest that petitioners ever waived their federal due process rights to adequate notice, a fair hearing, and an opportunity to opt out of a class action wholly for monetary judgments.

Indiana cannot set up a Hobson's choice to trap federal litigants from preserving their right to litigate in federal court: either challenge the jurisdiction of the state court and forego comment on due process and equal protection violations, or raise violations of the federal constitution and thereby forego challenge to the court's authority to issue any orders at all. *See, e.g., Stone v. INS*, 514 U.S. 386, 387 (1995),*Morales v. TWA*, 504 U.S. 374, 381 (1992); *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989). But that is precisely what occurred here. Amoco obtained an automatic change of venue from the county where the oil spill occurred (with a high percent of members of racial minorities) to a rural county (with virtually no racial minority residents). The state plaintiffs and Amoco then changed the state class action from an opt-out class to a mandatory class. Both counsel for the

state plaintiffs and counsel for the oil company were well aware of the pending federal case, but they both failed to give notice to counsel for the federal plaintiffs and then represented to the judge that their motions were "unopposed." A state judge lacking personal jurisdiction then signed the order of a mandatory class. When the federal plaintiffs were served the notice of the mandatory class -- prepared and hand delivered by the oil company -- they had to make a stark either/or choice between attacking the personal jurisdiction of the judge (without mentioning any other issue) or raising a challenge to the class certification under T.R. 23 (and thereby forfeiting their right to attack the power of the judge without jurisdiction to enter the order in the first place). As Justice Holmes wrote: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.... [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way." *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923). Indiana has placed unreasonable obstacles in the way of the exercise of federal due process rights plainly and reasonably asserted throughout this litigation. All of the due process rights asserted in the first question presented are adequately preserved for resolution by this Court.

4. Amoco Offered No Race-Neutral Reason for its Requested Change of Venue at the Time it was Ordered. The Court Should Invalidate Automatic Change of Venue Rules that Exclude Members of Racial Minorities from Juries Deliberating about Environmental Damage Occurring in Communities in which They Predominate.

The second question presented is "[w]hether a State trial rule allowing an automatic change of venue violates the Equal Protection Clause of the Fourteenth Amendment, where the rule permits wholesale exclusion of members of racial minorities from sitting on juries called to deliberate about environmental damage occurring within communities in which they predominate, and where no race-neutral reason for the request was required at the time the change of venue was ordered." Petitioners are not aware of any direct conflict among the federal circuits or highest state tribunals on this question.

We note, moreover, that after the events in this case the Supreme Court of Indiana amended T.R. 76. App. 49a. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), this Court

ruled that litigants in a civil action may not use peremptory challenges to exclude jurors because of their race. Relying expressly on *Edmonson*, the Superior Court of Lake County, the very same court in which this case was first lodged, entered findings of fact and conclusions of law on September 18, 1991, holding that "an individualized race-neutral justification cannot possibly be made by a litigant who excludes essentially all black persons via an automatic change of venue from [Lake] County" and for that reason ruled that T.R. 76 could no longer be applied constitutionally to cases in which litigants sought an automatic change of venue from Lake County. *Moore and Richardson v. Kocur*, Cause No. 45D05-9101-CT-260 (Lake Co. Sup. Ct., Sept. 18, 1991). On December 6, 1991, the Supreme Court of Indiana, again relying expressly on *Edmonson*, announced an amendment to Rule 76, abolishing the automatic grant of change of venue, "without having to state why [the parties] could not receive a fair trial in the county where the lawsuit was properly filed."App. 49a.

In ruling on the equal protection claim presented by the objectors/intervenors, the Court of Appeals held that the objectors satisfied the requirement of a prima face showing of racial discrimination on these facts. App. 22a. But the court erred in finding that Amoco had rebutted this claim by arguing on appeal a claim never presented in the trial court: that "they requested a change of venue to escape the widespread negative publicity in the Whiting/Hammond area surrounding the alleged migration of oil from the refinery," *id.* and in holding that Amoco "successfully presented a race-neutral justification for the change of venue in the present case." App. 23a.

The Court should grant the writ on the equal protection question for two reasons. First, this record shows that an automatic change of venue rule can "may be circumstantial evidence of discriminatory intent." App. 22a, citing *Osmulski v. Becze*, 638 N.E. 2d 828, 834 (Ind.Ct.App.1994). As this Court acknowledged in *Edmonson*, peremptory challenges can be a surrogate for intentional racial discrimination in civil litigation. All the more so with an automatic change of venue away from a county with dense populations of racial minorities. Intentionality need not be demonstrated only in overt statements of evil minds, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), but can be demonstrated through circumstantial evidence, or may be the product of reasonable inferences from the totality of the circumstances, including, as here, adventitious behavior. *Village of Arlington Heights v. Met. Housing Dev. Corp.*, 429 U.S. 252, 241 (1977). Here the oil company intentionally sought to move the case out of Lake

County, which under state law is the "preferred venue," Ind. T.R. 75, to Newton County. Why? Amoco's primary intent may have been to evade scrutiny in the county where the oil spill occurred. But it is reasonable to infer, as the Court of Appeals did in holding that a prima facie case of racial discrimination had been made, App. 22a, that Amoco also wished the natural consequences of moving the case from a county the population of which is approximately 25% African-American to a county with a population of African-Americans less numerous than .1%. This statistic in the record does not include members of other racial minorities such as Hispanic-Americans, who form nearly 30% of the petitioners. *See* Appendix O, App. 53a.

The Court normally defers to State procedural matters such as change of venue rules. Such deference must yield to strict scrutiny where, as here, a state trial rule authorizes mandatory, wholesale exclusion of members of racial minorities from juries. Peremptory challenges operate at retail, one juror at a time. Precisely because automatic transfer rules are automatic, they are more sweeping, working their intended effects at wholesale, an entire county at one stroke. If *Edmonson* is to have any meaningful application to civil litigation, it should not leave open a vast loophole that allows litigators to eliminate racial minorities from juries by automatic transfers away from coounties where people of color are densely concentrated. Members of racial minorities should not be eliminated from deliberating on juries about environmental damage occurring in communities in which they predominate. *See, e.g.*, Foster, *Justice from the Ground Up*, 86 CAL. L. REV. 775 (1998); Vicki Been, *Environmental Justice and Equities*, Chap. 25 in Patrick Rohan, ed., ZONING AND LAND USE CONTROLS (1995); Michael Gerrard, WHOSE BACKYARD, WHOSE RISK? (1994); Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994); Nat. Research Council, UNDERSTANDING RISK (1996). *See* Appendix O, App. 53a.

Second, in its discussion of Amoco's rebuttal of the prima facie case of racial discrimination, the Court of Appeals departed significantly from this Court's jurisprudence concerning the balance between free press and fair trial. In holding that the oil company met its burden of demonstrating a race-neutral justification for the change of venue, the Court of Appeals overlooked the obvious fact that the oil company offered no evidence on jury bias whatever at the trial court. Since lawyers on both sides of the street are gifted at inventing post-hoc justifications for impermissible conduct, courts must be especially careful in scrutinizing reasons offered to justify racial discrimination in the administra-

tion of civil justice. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The Court of Appeals failed to apply this standard here.

In its brief before the Court of Appeals Amoco cited only one article from the *Hammond Times*, dated January 24, 1991, as evidence of a story that it claimed "cast Amoco in an unfavorable light." Brief of Amoco Oil Company in Opposition to Intervenors' Appeal, at 24. We reproduce the entire article in the Appendix. App. 57a-61a. The Court can determine whether this story casts the oil company in "an unfavorable light," and more importantly, whether it is the sort of adverse publicity so poisoning the atmosphere that no panel of unbiased jurors could be relied upon to render a fair verdict in the county where the events took place. *See, e.g., Mu'mim v. Virginia*, 500 U.S. 415, 432 (1991) (requiring inquiry whether jurors could put aside what they had read or heard and render a fair verdict on the evidence). In *Mu'mim* the defendant submitted to the trial judge 47 newspaper articles relating to the murder "*before the voir dire* to make the judge aware of all of the allegedly prejudicial information to which prospective jurors might have been exposed." *Id.* at 433. Here, by contrast, the oil company offered only 1 newspaper article, App. 57a-61a, *at the appellate stage of litigation to bolster a claim it never presented at trial*. The Court should grant the writ on the equal protection issue, if only to advise lower courts not to dilute the rule governing jury bias articulated in cases like *Mu'mim*.

Petitioners have sustained injury acknowledged by the respondent. If their plight is truly "worse," on the oil company's admission, than a similar Amoco oil spill in Missouri, App. 69a, then they should be allowed the opportunity to vindicate their rights in a fair and full hearing in the federal forum of their choosing, represented by counsel of their choice, and before a jury from which members of racial minorities are not automatically excluded. "[O]ne who has a unique property right should be able to determine when and where they want to assert that right." Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. at 294, n. 183. Perhaps a federal jury in Hammond on which urban African-Americans and Hispanics could sit would have reached the same verdict as the all-white rural jury in Kentland. Under the Fourteenth Amendment, however, they are entitled to find that out in the forum of their own choosing, and they should not be bound by a proceeding that was

deeply flawed[6] and to which they repeatedly and strenuously objected. Petitioners have three due process rights: to pre-certification notice of a mandatory class, to a fair and full hearing on the certification issue, and to opt out of a class action wholly for a money judgment. They also have an equal protection right to a jury from which their African-American neighbors are not automatically excluded. This Court should address both questions presented.

[6] For example, the state trial court allowed the oil company to present to the jurors evidence of other polluters in northern Indiana, such as steel companies and chemical companies. On the issue of whether "the levels of benzene on the class plaintiffs' property were high enough to cause any short or long-term health problems or physical discomfort," the Court of Appeals relied on the testimony of a witness "who lives in the area but who was not a member of the class ... that he had never experienced any problems with oil on his property." App. 24a. Petitioners doubt that the district court or the Seventh Circuit would have indulged such leaps of logic, which F.R. Evid. 401 is designed to overcome.

Conclusion

The petition for a writ of certiorari should be granted.

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APPENDICES

Appendix A
Chronology of Principal Events

Date	Event
1/23/91	Letter from Amoco to residents of Whiting acknowledges leak of 16.8 million gallons of oil at Whiting refinery
2/1/91	3 State plaintiffs [St. Ps] file 23(B)(3) class action in Superior Ct. [St. Ct.] for Lake County
4/1/91	St. Ps files amended complaint, adding James Martin (lead P) & Mary Roman; still 23(B)(3)
4/24/91	Amoco moves for change of venue, stating no reason in support of motion. Motion granted automatically under Trial Rule [T.R.] 76. Case transferred from Lake County (25% African-American population) to Newton County (.1% African-American population).
6/10/91	Hon. Marvin McLaughlin appointed special judge, but fails to qualify w/in 20 days as required in T.R. 79(5) for exercise of jurisdiction by special judge.
10/10/91	43 Federal plaintiffs [Fed. Ps] file complaint in U.S. Dist. Ct. for N. Dist. of Ind. [Fed. Ct.] seeking permissive joinder under Rule 20, F.R. Civ. P., of claims for compensatory damages, and class action under Rule 23(b)(1), or in the alternative under 23(b)(3), limited to issue of punitive damages; assigned to Hon. J. T. Moody
1/7/92	Fed. Ps move for determination of 23(b)(3) class, limited to issue of punitive damages
1/23/92	St. Ps and Amoco file motions to certify mandatory class under T.R. 23(B)(1). Both counsel advise Judge McLaughlin that their motions are "unopposed." Without any notice to Fed. Ps or opportunity to be heard at certification "hearing," Judge McLaughlin immediately enters Order – prepared by Amoco – for 23(B)(1) mandatory class with no opt-out. Amoco hand delivers in

"Amoco Communicator" the Notice of Class Action – also prepared by Amoco – to residents of Whiting, Indiana.

1/28/92 Amoco moves to stay proceedings in Fed. Ct. on ground that no opt-out class in St. Ct. includes all Fed. Ps and all claims in fed. case.

2/3/92 Fed. Ps move in St. Ct. to vacate order of mandatory class, focusing exclusively on Judge McLaughlin's lack of jurisdiction for failure to qualify under T.R. 79(5); no ruling on motion.

2/14/92 90 Fed. Ps file amended complaint in Fed. Ct., adding new Ps, a new state claim of unjust enrichment, and a federal question claim under CERCLA.

3/6/92 Fed. Ps file in St. Ct. a memorandum of law in support of motion of 2/3/92, focusing exclusively on Judge McLaughlin's lack of jurisdiction for failure to qualify under T.R. 79(5).

3/18/92 Judge McLaughlin denies Fed. Ps' motion for his revocation, finding T.R. 79(5) "useless."

3/25/92 Fed. Ps file praecipe (notice of appeal) to challenge Judge McLaughlin's jurisdiction; ruling of 3/18/92 is the only order on file at the time; Fed. Ps later decide to abandon this appeal.

3/26/92 Judge Moody grants motion of Fed. Ps (contested by Amoco) to file amended complaint, and denies Amoco's motion for stay of fed. proceedings, questioning "ability of St. Ct. proceedings to protect the rights and interests of all the Fed. Ps in this action."

6/5/92 Fed. Ps file motion in St. Ct. for leave to opt out of mandatory class action on 4 grounds: (1) lack of pre-certification *notice*, (2) lack of meaningful *hearing* to consider propriety of certification of mandatory class, (3) *constitutional right to opt-out* of class action predominantly for money judgment, and (4) fundamental fairness to litigants and judicial economy (federal plaintiffs should not be required to engage in litigation on

same issues both in state and in federal court); no ruling on motion.

6/17/92 Amoco news release claims that leak of 16.8 million gallons of oil is confined primarily to its own property, but acknowledges that 25,000 to 50,000 gallons of oil "migrated" past boundaries of refinery to adjacent homes.

6/22/92 Fed. Ps file alternative motion in St. Ct. seeking to establish subclass of residents living w/in zone acknowledged by Amoco in release of 6/17/92 to be contaminated.

6/24/92 Fed. Ps file memorandum in St. Ct. in support of motion of 2/3/92 to opt out of mandatory class; Judge McLaughlin "overrules all motions to opt out of class."

8/27/92 Fed. Ps file motion in St. Ct. to set aside or vacate order certifying mandatory class or to set a hearing to determine whether the case should continue as a mandatory class or as an opt-out class. In Fed. Ct. Judge Moody grants motion for extension of time w/in which to complete discovery in fed. case, and sets trial date for 11/1/93.

9/8/92 St. Ps file request in St. Ct. for order that Fed. Ps' motion of 8/27/92 is "repetitive" T.R. 53.4.

9/15/92 Amoco files in St. Ct. opposition to Fed. Ps' motion of 8/27/92. Fed. Ps file response to St. Ps' motion of 9/8/92, noting that Judge McLaughlin had never ruled on any of the 7 arguments supporting Fed. Ps' motion of 8/27/92. Judge McLaughlin denies St. Ps' motion of 9/8/92, and postpones consideration of Fed. Ps' motion of 8/27/92 to pre-trial conference, set for 2/5/93.

10/29/92 Amoco files objection in St. Ct. that Fed. Ps' motion of 8/27/92 raised same considerations that Judge McLaughlin had already rejected. Fed. Ps file memorandum in support of motion of 8/27/92, noting that Judge McLaughlin had never formally ruled on any of the arguments urged in support of their motion of 8/27/92. Judge

McLaughlin again postpones consideration of motion of 8/27/92.

3/5/93 Fed. Ps file supplemental petition in St. Ct. to intervene in St. class action as subclass of residents living w/in zone acknowledged by Amoco in release of 6/17/92 to be contaminated.

3/19/93 St. Ps file opposition to Fed. Ps' petition of 3/5/93.

4/26/93 Judge McLaughlin "overrules any pending opt-out motions," and recuses himself from St. case. Hon. Robert Smart is named special judge and qualifies under T.R. 79(5).

6/2/93 St. Ps move to substitute Henry Cornelius (a former Fed. P) but maintain objection to intervention by other Fed. Ps and to creation of a subclass.

6/24/93 Status conference: St. Ps withdraw prayer for injunctive relief. Judge Smart grants motion to substitute former Fed. P Henry Cornelius in place of Eugene and Wanda Burkat; Cornelius withdraws as Fed. P. Judge Smart grants motion of Fed. Ps to withdraw motion of 3/5/93 to intervene as subclass. Richard Komyatte, counsel for Fed. Ps, agrees to assist St Ps as co-counsel, but all Fed. Ps (other than Cornelius) continuously object to participation in mandatory state class action wholly for monetary judgment.

8/9/93 Fed. Ps move in St. Ct. to reconsider Judge McLaughlin's denial of motion to opt out, based on stipulation of St. Ps and Amoco that state case is wholly for damages.

8/11/93 Judge Smart motion to reconsider Judge McLaughlin's denial of motion to opt out

10/8/93 Trial begins in St. Ct.

11/22/93 State case submitted to jury; while jurors are deliberating, Fed. Ps renew motion of 8/27/92 to opt out of mandatory class.

11/23/93 Judge Smart denies Fed. Ps' motion to opt out, and denies hearing to reconsider whether S. case

should continue as mandatory class

11/29/93 Jury verdict against St. Ps and for Amoco on all counts.

12/14/93 Judge Smart enters final judgment order & judgment on the verdict. Fed. Ps file motion for leave to intervene for purposes of moving to correct errors or to file an appeal.

1/13/94 Judge Smart grants Fed. Ps' motion of 12/14/93; Fed. Ps file motion to correct errors: lack of pre-certification notice; denial of fair opportunity to oppose certification of mandatory class; denial of right to opt out of class action wholly for money judgment; denial of equal protection through automatic grant of change of venue from Lake County to Newton County

3/21/94 Hearing in St. Ct. on motions to correct errors. Amoco opposes ability of Fed. Ps (Intervenors) to file a motion to correct errors.

6/8/94 Judge Moody grants Fed. Ps motion for summary judgment on CERCLA claim in amount of $46K, and stays Fed. case pending final resolution of St. Ct. proceedings, including appeals.

8/1/94 Judge Smart denies Fed. Ps' motion to correct errors, denies Amoco's opposition to Fed. Ps' motion to correct errors, grants judgment on the evidence on intentional trespass claim against Amoco; holding that class representatives failed to prove compensatory damages, he awards nominal damages in the amount of one dollar to each named class representative (total of $2)

8/31/94 Fed. Ps file praecipe in timely basis. In briefs before the Ct. of App. of Ind. Fed. Ps argue federal constitutional questions: (A) denial of due process through (1) lack of pre-certification notice, (2) lack of fair opportunity to oppose certification of mandatory class, and (3) denial of right to opt out of class action wholly for money judgment; and (B) denial of equal protection through automatic grant of change of venue from Lake

County to Newton County.

4/3/97 Fully briefed on federal constitutional Qs, Ct. of App. of Ind. issues opinion ruling that Fed. Ps waived their right to challenge certification of mandatory class by failure to file praecipe w/in 30 days of final judgment; Ct. did not directly address due process claims of Fed. Ps (lack of notice, lack of meaningful hearing, denial of right to opt out), but ruled in single sentence that they were waived along with the right to challenge certification order. On equal protection issue, Ct. of App. finds prima facie case of racial discrimination in automatic grant of request for change of venue, but finds that Amoco offered a race-neutral justification in rebuttal at appellate stage of litigation.

7/10/97 Ct. of App. of Ind. denies rehearing.

6/29/98 On transfer, S. Ct. of Ind. rules that a certification order is interlocutory in nature. Fully briefed on federal constitutional Qs, S.Ct. of Ind. does not address these federal Qs, but summarily affirms the Ct. of App. on all other issues.

9/18/98 In A-232, Justice Stevens grants application for extension of time w/in which to file a petition for certiorari, up to 10/28/98.

Appendix B

In the Supreme Court of Indiana

James Martin, Mary Roman, Robert O'Drobinak and Henry Cornelius, Individually and on Behalf of All Others, Appellants/Class Representatives Below,

v.

Amoco Oil Company, Appellee/Defendant Below.

No. 56A03-9409-CV-333 in the Court of Appeals
No. 56S03-9804-CV-242 in the Supreme Court

Appeal from the Newton Circuit Court
The Honorable Robert B. Smart, Judge
Cause No. 56C01-9105-CT-67
June 29, 1998.

Saul I. Ruman, David W. Holub, David M. Hamacher, Hammond, Richard P. Komyatte, Highland, John W. Barce, Kentland, for Appellants.

Larry G. Evans, William F. Satterlee, III, F. Joseph Jaskowiak, Jack A. Kramer, Valparaiso, Patrick J. McManama, Crown Point, for Intervenors Joseph & Dorthea Zrnchik, et al.

James J. Neath, Amoco Oil Company, Chicago, Evan E. Steger, Indianapolis, Thomas F. Ryan, Timothy E. Kapshandy, Chicago, for Appellee.

SHEPARD, Chief Justice.

The Court of Appeals expressed doubt in this case about whether an order certifying a class action is interlocutory in nature or final upon entry and thus appealable as of right. We hold it is interlocutory.

Procedural History

On February 1, 1991, appellant Robert O'Drobinak filed suit against Amoco Oil Company on behalf of himself and 500 residents of Whiting, Indiana. These claims origi-

nated from a notice from Amoco to the residents which warned of the possibility of underground oil migration onto their properties. Both Amoco and the plaintiffs moved to certify the class under Indiana Trial Rule 23(B)(1) on January 23, 1992. The court granted the motion on the same day.

Eight days later, attorney Richard Komyatte entered an appearance for a group of individuals who were at that time pursuing a separate suit in federal court based on the same alleged oil migration.[1]

On February 3, 1992, these individuals moved to vacate the class certification order. The court denied this and similar subsequent motions.[2] On March 25, 1992, Komyatte's clients filed a praecipe with the trial court clerk, ostensibly to appeal the class certification order, but they did not file the record with the Court of Appeals or otherwise pursue the appeal. Instead, they apparently chose to participate in the litigation as members of the class. Nearly a year and seven months later, the jury returned verdicts of not liable on all counts. The court entered final judgment on December 14, 1993. The trial court later granted plaintiffs' motions to correct error as to one claim, but it largely left the jury verdict intact.

On appeal, plaintiffs claimed, in part, that the trial court erred in certifying the class under T.R. 23(B)(1). Writing for the Court of Appeals, Judge Garrard held that they had knowingly waived their right to present the issue on appeal. *Martin v. Amoco Oil Co.*, 679 N.E.2d 139, 145 (Ind.App.1997). In so deciding, the court observed that, at the time the order was entered, Indiana law clearly stated that class certification orders were final and appealable. *Id.* (citing *American Cyanamid Co. v. Stephen*, 600 N.E.2d 1387 (Ind.Ct.App. 1992)). It held that appellants had relinquished the opportunity for appeal that they possessed in 1992. It was correct to hold that at the time relevant to this appeal, class certification orders were final and appealable.

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[1] The federal suit is currently stayed pending the outcome of this appeal.

[2] Eventually, the court ordered these plaintiffs to refrain from filing repetitive motions on the issue.

In coming to its conclusion, however, the court declined to ground its decision on the premise that class certification orders *remain today* final interlocutory orders, stating: "it is not clear after our supreme court's decision in *Berry v. Huffman*, 643 N.E.2d 327 (Ind.1994) whether class certification orders are final and appealable orders at the present time." *Martin*, 679 N.E.2d at 144. We granted transfer to clarify whether *Berry*, decided after the time relevant to this appeal, changed the law in this regard.

Discussion

The Court of Appeals pondered whether this case could be distinguished from *Berry* on the ground that the trial court's judgment in *Berry* dealt with a motion for partial summary judgment under T.R. 56(C) while in the instant case the trial court granted motions for certification under T.R. 23(B)(1). For the purpose of determining the appealability of a trial court order, however, this distinction is without significance.

Berry v. Huffman was not a case about summary judgment or about class actions. It addressed the general appealability of orders under Trial Rules 54 and 56. As we said then: "[T]he certification requirements of Trial Rules 54(B) and 56(C) supersede the distinct and definite branch doctrine. Judgments or orders as to less than all of the issues, claims, or parties remain interlocutory until expressly certified as final by the trial judge. To the extent that *Richards* and other cases support the distinct and definite branch doctrine, they are overruled. Were we to hold otherwise, litigants would again be left to guess whether or not a given order was appealable. This is precisely the situation that T.R. 54(B) and 56(C) were drafted and adopted to prevent. *Berry*, 643 N.E.2d at 329 (citations omitted). This logic applies with equal force to class certification orders and, indeed, to all orders or judgments which are not "final" under the requirements of Trial Rule 54(B). Were this not so, the rule would undoubtedly be swallowed by its own exceptions. The distinct and different branch doctrine, superseded by our adoption of the Indiana Rules of Trial Procedure as explicitly stated in *Berry*, would live on in prac-

tice if not in word.

A judgment or order as to less than all of the issues, claims, or parties in an action may become final only by meeting the requirements of T.R. 54(B). These requirements are that the trial court, in writing, expressly determine that there is no just reason for delay and, in writing, expressly direct entry of judgment. T.R. 54(B); *Berry*, 643 N.E.2d at 329.

We adopted Rules 54(B) and 56(C), based on the federal model, in an effort to provide greater certainty to litigating parties and to strike an appropriate balance between the interests in allowing for speedy review of certain judgments and in avoiding the inefficiencies of piecemeal appeals. *Berry*, 643 N.E.2d at 329 (citing 3 William F. Harvey, Indiana Practice: Rules of Procedure Annotated § 54.2 at 480-82 (2nd ed. 1988 & Supp.1993)). Unsatisfactory experiences with the common law "distinct and different branch of litigation" doctrine, which often lead to inefficient and unjust results, had much to do with the change. *Id.* at 328 (citing as examples *Guthrie v. Blakely*, 234 Ind. 167, 125 N.E.2d 437 (1955); *Washington v. Chrysler Corp.*, 137 Ind.App. 482, 200 N.E.2d 883 (1964).)

The formalistic (but bright line) approach to which we now adhere removes uncertainties about when a party should appeal, thus minimizing the risk that an appeal will be dismissed as premature or that the right to appeal will be inadvertently lost. Further, the rules place the discretion of deciding when the facts indicate that a judgment should be deemed final in the hands of the individual best able to make such decisions-the trial judge. *Id.*

To the extent that Martin v. Amoco Oil Co., 679 N.E.2d 139 (Ind.App.1997) and other cases support the continuation of the distinct and definite branch doctrine, they are overruled.3 Unless the trial court certifies its T.R. 23 determination as final under T.R. 54(B), it remains in-

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[3] Footnote two of *Connerwood Healthcare v. Estate of Herron*, 683 N.E.2d 1322 (Ind.Ct.App.1997), stating "we agree [with the *Martin* court] that class certification orders are final and appealable," is specifically disapproved.

terlocutory. As we stated in Berry: "Were we to hold otherwise, litigants would again be left to guess whether or not a given order was appealable. This is precisely the situation that T.R. 54(B) and 56(C) were drafted and adopted to prevent." Berry, 643 N.E.2d at 329.

Conclusion

The Court of Appeals properly disposed of the claims in this appeal, and we summarily affirm on each claim. Ind. Appellate Rule 11(B)(3).[4] The trial court is affirmed in part and reversed in part in accord with the mandate of the Court of Appeals.

Dickson, Sullivan, Selby and Boehm, JJ., concur.

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[4] We take this opportunity to re-explain the difference between the terms "summarily affirm" and "expressly adopt." Indiana Appellate Rule 11(B)(3) states in part: "The opinion or memorandum decision of the Court of Appeals shall be final except where a petition to transfer has been granted by the Supreme Court. If transfer be granted, the judgment and opinion ... of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court."

Often, as in this instance, this Court grants transfer to address only one of several issues addressed by a Court of Appeals' opinion. When this occurs, we use the term "summarily affirm" to indicate that we decline to review the remainder of the opinion. *McGowan v. State*, 674 N.E.2d 174 (Ind.1996). In essence, we partially deny transfer on these issues. Id. (citing *Kimberlin v. DeLong*, 637 N.E.2d 121, 123 (Ind.1994)). In contrast, the term "expressly adopt" indicates that we accept the reasoning of a Court of Appeals' opinion as our own.

Appendix C

In the Court of Appeals of Indiana

James Martin, Mary Roman, Henry Cornelius, and Robert O'Drobinak, Individually and on behalf of all others similarly situated, Appellants-Plaintiffs,
vs.
Amoco Oil Company,
Appellee/Cross-Appellant Defendant.

Joseph and Dorthea Zrnchik, et al.,
Appellants/Intervenors,
vs.
Amoco Oil Company, Appellee/Defendant.

No. 56A03-9409-CV-333.

Appeal from the Newton Circuit Court
The Honorable Robert B. Smart, Judge
Cause No. 56C01-9105-CT-67
April 3, 1997
Rehearing Denied, July 10, 1997.

Attorneys for Appellants: Saul I. Ruman, David W. Holub, David M. Hamacher, Ruman, Clements, Tobin & Holub, P.C., Hammond, Indiana; John W. Barce, Barce & Ryan, Kentland, Richard P. Komyatte, Komyatte & Freeland, Highland, Indiana; Larry G. Evans, William F. Satterlee, III, F. Joseph Jaskowiak, Jack A. Kramer, Hoeppner, Wagner & Evans, Valparaiso, Indiana; Patrick J. McManama, Patrick J. McManama, P.C., Crown Point, Indiana.

Attorneys for Appellee: Thomas F. Ryan, Timothy E. Kapshandy, Brandon D. Lawniczak, Sidley & Austin, Chicago, Illinois; James J. Neath, Amoco Oil Company, Chicago, Illinois; Fred R. Biesecker, Ice Miller Donadio & Ryan, Indianapolis, Indiana.

GARRARD, Judge.

James Martin, et. al. (collectively "Class Plaintiffs"), Amoco Oil Company ("Amoco"), and Joseph and Dorthea Zrnchik, et al. (collectively "Intervenors")[1] appeal various facets of a class action involving the alleged underground migration of oil from Amoco's Whiting, Indiana refinery to Class Plaintiffs' and Intervenors' property.

Reversed and remanded in part, and affirmed in part.

FACTS

This bitterly contested and often vexatious appeal began its journey to this court on February 1, 1991, when Robert O'Drobinak and Eugene Burkat[2] filed suit against Amoco in Hammond, Indiana on behalf of themselves and the 500 residents of Whiting, Indiana who had received notice from Amoco of the possible underground migration of oil onto their properties. The complaint, as finally amended, alleged negligence, negligence per se, nuisance, strict liability, negligent/intentional infliction of emotional distress, and intentional trespass on the part of Amoco.

On April 24, 1991, Amoco moved for an automatic change of venue from Hammond pursuant to then Ind.Trial Rule 76. After both parties struck a proffered county, the cause was venued to the Newton County Circuit Court. Shortly thereafter, on June 10, 1991, Judge Marvin McLaughlin was appointed special judge. Judge McLaughlin immediately assumed control of the case, but did not file an appearance and qualification as special judge.

The next significant event did not occur until January 23, 1992, when Class Plaintiffs and Amoco both filed mo-

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[1] We refer to these parties as Intervenors solely for the sake of convenience. They originally became part of this class action as unnamed class plaintiffs and intervened only after the jury verdict for purposes of filing a motion to correct error and pursue the present appeal. Because their status during the various stages of the litigation is in question, we use the term "Intervenors" only as a collective name for the group and do not imply that they officially intervened to become part of the suit.

[2] Mr. O'Drobinak was subsequently joined as a class representative by James Martin and Mary Roman, while Mr. Burkat dropped out of the suit on June 24, 1993.

tions to certify the class as a mandatory class under Ind.Trial Rule 23(B)(1). A telephone conference between Class Plaintiffs, Amoco, and Judge McLaughlin was held and the order certifying the class as a T.R. 23(B)(1) mandatory class was entered the same day the motions were made. It is worth note that, as was characteristic of the entire three year life of this suit, the interims between events of major importance were filled with multiple minor motions by the parties to which the trial court was forced to respond.[3]

On January 31, 1992, eight days after the class certification order, attorney Richard Komyatte entered his appearance on behalf of a group of individuals (the Intervenors) who were then pursuing a separate suit against Amoco in federal court based on the same alleged oil migration.[4] On February 3, 1992, Intervenors filed a motion to vacate the class certification order and to revoke the appointment of Judge McLaughlin for failing to properly appear and qualify under Ind.Trial Rule 79. Judge McLaughlin subsequently denied both motions. The Intervenors repeatedly filed motions to vacate the certification order and revoke Judge McLaughlin's appointment. These motions were continuously denied until Judge McLaughlin ordered the Intervenors, on the motion of Amoco, to refrain from filing repetitive motions on the matter. On March 25, 1992, the Intervenors filed a praecipe, ostensibly to appeal the class certification order, but did not file the record with this court or pursue the appeal in any manner.

Between March and June of 1992, the parties, now including the Intervenors, continued disputing the limits and process of discovery, many of the disputes involving discovery of unnamed class members. Eventually Class Plaintiffs agreed, though reluctantly, to draft and send a questionnaire to the unnamed class members about their individual claims and damages. The questionnaire explicitly

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[3] To put in context the amount of material the trial court was forced to consider, we point out that the record on appeal consists of 16,321 pages in 74 volumes packaged in 14 boxes.

[4] Intervenors' federal suit is currently stayed pending the outcome of the present appeal.

stated that failure to answer the questionnaire and return it to the class representatives would jeopardize the unnamed members' ability to participate in the suit and possibly preclude them from making any claims against Amoco. On June 24, 1992, the trial court, upon the motion of Amoco, issued an order setting a deadline for the return of the questionnaires and ordering that any unnamed member who did not respond before this deadline would be dismissed from the suit. The deadline was repeatedly extended by the trial court, but eventually approximately 301 of the 500 class members were dismissed from the suit.

After almost two years as special judge, Judge McLaughlin recused himself on April 26, 1993, and Judge Robert Smart was appointed as special judge. One day later, on April 27, 1993, Judge Smart filed his appearance and qualification as special judge. None of the parties challenged Judge Smart's appointment or appearance at that time, or now on appeal.

On June 2, 1993, Henry Cornelius, a former member of the Intervenors, was named a class representative. At this time, attorney Komyatte along with the Intervenors joined Class Plaintiffs in the prosecution of this suit.[5] The last challenged discovery order was filed on June 24, 1993. This order required independent medical examinations ("IMEs") for all class members who were to testify about physical discomfort and ailments allegedly caused by the underground oil. Most class members who were to testify eventually submitted to the IMEs, but it appears from the record that some witnesses were prevented from testifying about any physical discomfort because they had not submitted to the examinations.

Opening statements by Class Plaintiffs began on October 7, 1993. On October 8, 1993, the trial court granted Amoco's motion in limine excluding any reference to Class

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[5] For the sake of convenience, we will refer to the joined group of the Class Plaintiffs and Intervenors during the trial as the Class Plaintiffs. We note that the Intervenors reasserted their separate identity when they petitioned to intervene after the verdict to pursue a separate motion to correct error.

Plaintiffs' fear or anxiety caused by fires or explosions at the Whiting refinery. Class Plaintiffs objected to this order in a timely manner, thus preserving the issue for appeal. The trial continued for the next seven weeks until the jury began deliberating on November 22, 1993. On that day, while the jury was still deliberating, Class Plaintiffs renewed their motion to vacate the class certification order and revoke the appointment of Judge McLaughlin. The next day Judge Smart denied both the motion to vacate the class certification order and the motion to revoke the appointment of Judge McLaughlin. On November 29, 1993, the jury returned a verdict of not liable on all counts. Judge Smart entered final judgment on this verdict on December 14, 1993.

On December 30, 1993, the Intervenors, no longer acting as part of the class, filed a motion to intervene for the purpose of filing a motion to correct error. Judge Smart granted this motion to intervene on January 13, 1994. Both the Intervenors and the Class Plaintiffs then filed their individual motions to correct error on January 13, 1994. Over the next eight months, the trial court heard arguments by the parties and responded to a series of accusations and motions filed by and against all three parties. On August 1, 1994, Judge Smart entered his order on the various motions to correct error. This order granted judgment on the evidence on the intentional trespass claim against Amoco. Judge Smart then proceeded to hold that the class representatives had failed to prove any compensatory damages and awarded each of the named class representatives nominal damages in the amount of one dollar. In all other respects, Judge Smart affirmed the verdict of the jury.

All three parties appeal this decision. Further facts will be provided where necessary.

ISSUES

Class Plaintiffs, Intervenors, and Amoco present several issues for review which we consolidate and restate as follows.

Intervenors present four issues on appeal which we restate and consolidate as:

1. Whether the trial court erred by certifying the class as a mandatory class under T.R. 23(B)(1).
2. Whether Judge McLaughlin's appointment as special judge was revoked for failure to comply with T.R. 79.
3. Whether the automatic change of venue from Lake County to Newton county served as a wholesale peremptory challenge of any African-American juror, thus violating the Equal Protection Clause.

Amoco presents one issue on appeal.

1. Whether the trial court erred by holding Amoco liable for intentional trespass despite the jury's verdict.

Class Plaintiffs present six issues on appeal which we consolidate and restate as:

1. Whether the trial court erred by failing to find Amoco liable on the nuisance claim.
2. Whether the trial court erred by dismissing 301 unnamed class members for failing to respond to a discovery questionnaire.
3. Whether the trial court erred by excluding evidence of the class members' fear and anxiety, and evidence of fires and explosions at the Amoco refinery.
4. Whether the trial court erred by ordering independent medical examinations of unnamed class members and by precluding the testimony of those who did not submit to these examinations.

DISCUSSION

I. Intervenors' Claims

A. Challenges to the Class Certification

Intervenors first claim that the trial court erred when it certified the class as a mandatory class action under T.R. 23(B)(1) for two reasons. First, they argue that the court erred because the class action did not meet the requirements of T.R. 23(B)(1) and, secondly, the court violated Intervenors' due process rights by failing to provide them notice of the class certification hearing and failing to hold a hearing on the certification of the class. Both claims challenge, though in different ways, the validity of the mandatory class. Amoco makes two arguments as well, arguing that

the class was properly certified as a T.R. 23(B)(1) mandatory class, and that the Intervenors waived this issue because class certification determinations are final and appealable interlocutory orders that must be appealed at the time of the order. We agree that the Intervenors have waived any challenge to the class certification, but for a different reason.

We decline to ground our holding on the sole premise that class certification orders are final and appealable interlocutory orders, because it is not clear after our supreme court's decision in *Berry v. Huffman*, 643 N.E.2d 327 (Ind. 1994) whether class certification orders are final and appealable orders at the present time. *Amoco* relies on *American Cyanamid Co. v. Stephen*, 600 N.E.2d 1387 (Ind.Ct.App. 1992), *trans. denied*, for the proposition that certification orders are final and appealable orders. *American Cyanamid*, in stating that certification orders are final and appealable, relied on this court's opinion in *Gulf Oil Corp. v. McManus*, 173 Ind.App. 147, 363 N.E.2d 223 (1977). In *Gulf Oil*, we held that class certification orders were final and appealable because they disposed of a distinct and definite branch of the litigation. *Id.* 363 N.E.2d at 227. Cases following *Gulf Oil*,[6] including *American Cyanamid*, all followed the same reasoning: certification orders are final and appealable because they dispose of a distinct and definite branch of the litigation.

In *Berry*, our supreme court explicitly held that the definite-and distinct branch doctrine had been superseded and that interlocutory orders were final only when expressly certified as final and appealable by the trial judge. *Berry*, 643 N.E.2d at 329. While *Berry* did not involve a class certification order, its broad abrogation of the distinct branch doctrine undercuts the original rationale for deeming it a final order. *CSX Transp., Inc. v. Clark*, 646 N.E.2d 1003 (Ind.Ct.App.1995), written after *Berry*, dealt with an inter-

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[6] *Koors v. Great Southwest Fire Ins. Co.*, 530 N.E.2d 780 (Ind. Ct. App.1988), *reh'g denied*; *CSX Transp., Inc. v. Rabold*, 593 N.E.2d 1277 (Ind. Ct. App. 1992), *trans. denied*; *CSX Transp., Inc. v. Clark*, 646 N.E. 2d 1003 (Ind. Ct. App. 1995); *ConAgra v. Farrington*, 635 N.E.2d 1137 (Ind. Ct. App. 1994), *reh'g denied*.

locutory appeal from a conditional class certification without even discussing the propriety of the appeal in light of Berry. Though we agree with the reasoning in *Gulf Oil* that class certification hearings and orders are the only "trial" to be had on the issue of class certification and therefore should be final and appealable, we are constrained by *Berry* from simply so holding. Notwithstanding this, we hold that the Intervenors have clearly waived these challenges to the class certification.

Waiver is the "'intentional relinquishment or abandonment of a known right or privilege.'" *State v. Owings*, 622 N.E.2d 948, 952 (Ind.1993) (quoting *Phillips v. State*, 543 N.E.2d 646, 648 (Ind.Ct.App.1989)). A party may waive a right by word or deed. *Id.* A party may also waive a constitutional right. *Marshall v. State*, 254 Ind. 156, 258 N.E.2d 628, 631 (1970), reh'g denied. "Due process rights are subject to waiver." *Town of Speedway v. Harris*, 169 Ind.App. 100, 346 N.E.2d 646, 653 (1976). A waiver of a constitutional right, such as Intervenors' due process claim, must be voluntarily, intelligently, and knowingly made. *Id.*

At the time of the class certification order on January 23, 1992, class certification orders were clearly final and appealable interlocutory orders. *See American Cyanamid Co. v. Stephen*, 600 N.E.2d 1387 (Ind.Ct.App. 1992), *trans. denied*. Intervenors knew that they were required to immediately appeal the order, as reflected by the praecipe they filed on March 25, 1992. They forewent their right to appeal this issue by then failing to file the record or further pursue their appeal at that time. Following this, the Intervenors fully participated in the trial, joining the Class Plaintiffs,[7] with their attorney serving as co-counsel. Intervenors now attempt to rely on the fortuitous decision in *Berry* to gain a second chance to appeal this issue. *Berry* was handed down on November 30, 1994, after the present appeal had been commenced and more than two years after the class certification. We need not allow Intervenors a second chance at an issue that they had previously declined to pursue. By de-

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[7] One of the Intervenors, Henry Cornelius, was made a named class representative.

clining to exercise their known right to immediately appeal the class certification and electing to fully participate in the proceedings, the Intervenors waived any objections to the certification of the class. We, therefore, hold that Intervenors' challenge to the propriety of the class and their due process challenge of the class were waived.

B. Challenge of Judge McLaughlin

Intervenors claim that Special Judge McLaughlin did not appear and qualify as required by Ind.Trial Rule 79(5) and therefore his actions, specifically the class certification, are void. T.R. 79(5) required that a special judge appear and qualify within twenty days of his or her appointment. Judge McLaughlin was appointed on June 10, 1991, but nowhere in the record or the chronological case summary does Judge McLaughlin appear and qualify as the special judge. It is clear that immediately after his appointment, Judge McLaughlin assumed control of this suit and acted as the special judge.[8] While it is true that Intervenors promptly objected to the Judge's appointment upon being brought into the suit by the class certification, their claim is merely a different attempt to once again challenge the class certification. We say this because class certification is the only ruling they challenge, and because, unlike the situation in *Taylor v. State*, 507 N.E.2d 978 (Ind.1987), Judge McLaughlin was succeeded by an admittedly qualified judge who tried the case.

As noted above, waiver is the intentional relinquishment of a known right. *State v. Owings*, 622 N.E.2d 948, 952 (Ind.1993). The only harm that Intervenors claim is the certification of the class. Intervenors participated fully in the trial, presided over by the duly appointed and qualified Judge Smart, and presented the same evidence and wit-

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[8] Neither Amoco nor the Class Plaintiffs challenge Judge McLaughlin's jurisdiction over this suit. In fact, neither party could challenge the appointment because they submitted to the jurisdiction of Judge McLaughlin when they submitted motions to him and acted in accordance with his orders. *Bivins v. State*, 485 N.E. 2d 89 (Ind. 1985) (failure to promptly object to judge's appointment waives any objection).

nesses that would have been presented regardless of Judge McLaughlin's failure to qualify. Moreover, at the end of the trial, Intervenors renewed their objection to Judge McLaughlin's appointment before Special Judge Smart. After reviewing the matter, Judge Smart denied their motion. Intervenors do not appeal this decision, making it clear that the true aim of this challenge is the class certification.

By participating fully in the trial and renewing their objection before Judge Smart, Intervenors waived their right to again attack the class certification through the technical challenge to Judge McLaughlin's appointment.

C. Equal Protection Challenge of the Change of Venue

Intervenors claim as their third and final error that the automatic change of venue from Lake county to Newton county pursuant to Ind.Trial Rule 76 violated the Equal Protection Clause. Specifically, the Intervenors claim that the change of venue was the equivalent of a wholesale peremptory challenge of African-Americans because African-Americans make up only .1% of the Newton County population as opposed to 25% in Lake County. In their Appellant's Brief, the Intervenors originally challenged the application of T.R. 76.[9] However, in their Reply Brief, Intervenors claim to be making a facial challenge to T.R. 76, not a challenge of its application." An issue may not be raised for the first time in a reply brief." *Matter of Adoption of H.M.G.*, 606 N.E.2d 874, 874, n. 1 (Ind.Ct.App.1993). We will, therefore, discuss only Intervenors' challenge to the application of the T.R. 76 automatic change of venue to Newton county.

This court dealt with the same equal protection challenge involving the same counties in *Osmulski v. Becze*, 638 N.E. 2d 828 (Ind.Ct.App.1994) (Garrard, J.). To succeed in their challenge, the Intervenors must establish a prima facie case of discrimination. *Id.* at 834. "To establish a prima fa-

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[9] "Given the unconstitutional *application* of former Trial Rule 76, this Court must modify the Final Judgment Order and Judgment on the Verdict of the court below and make it inapplicable to the Intervenors." Appellant's Brief, p. 47 (emphasis added).

cie case of discrimination, the litigant is entitled to rely on the fact that the mere exercise of a peremptory challenge (or, under these facts, an automatic change of venue) may be circumstantial evidence of discriminatory intent...." *Id.* Once a prima facie case of discrimination has been made the burden shifts to the defendant, Amoco, "to come forward with a race-neutral explanation for the exclusion." *Id.* The race-neutral explanation need not be enough to support a challenge for cause, but Amoco must do more than simply deny a discriminatory intent. *Id.* Amoco must present a race-neutral explanation related to the facts of this particular case. *Id.*

Because in *Osmulski* we found the change of venue to a venire with such a small percentage of African-Americans was prima facie evidence of discrimination, we now also find the Intervenors have established a prima facie case of discrimination. The burden then shifted to Amoco to present a race-neutral explanation for the change of venue in this case. Amoco argues that they requested a change of venue to escape the widespread negative publicity in the Whiting/Hammond area surrounding the alleged migration of oil from the refinery. Amoco points to numerous newspaper articles about the oil migration and to the statements of witnesses and attorneys in the case. Class Plaintiffs' attorney Ruman, speaking about one article in particular, stated that the entire Northwest Indiana Community read the article about the incident. Amoco argues, and we agree, that this publicity could well have prejudicially affected the trial. We hold that Amoco has successfully presented a race-neutral justification for the change of venue in the present case and has, therefore, carried its burden of rebutting Intervenors' prima facie case. Because the change of venue request was made for race-neutral reasons, Intervenors' equal protection rights were not violated by the change of venue from Lake county to Newton county.[10]

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[10] We find it interesting to note that none of the Class representatives or named Intervenors were African-Americans and that from review of the record it appears that Intervenors/Class Plaintiffs attempted to emphasize this fact before the all white jury.

II. Amoco's Claim

Amoco claims that the trial court erred when it granted Class Plaintiffs' motion to correct error and entered judgment on the evidence finding Amoco liable for intentional trespass. More specifically, Amoco claims that the trial court applied the incorrect intent standard for proving intentional trespass. In its order on the motion to correct error, the trial court stated that Amoco's intent to refine oil in Whiting was sufficient to fulfill the intent element of the intentional trespass claim. Amoco claims that the mere intent to refine oil is not sufficient to satisfy this requirement. We agree. Because we find the issue of intent to be dispositive, we need not discuss the sufficiency of the evidence of trespass.

In its order granting judgment on the evidence, the trial court found that the simple intent to refine oil at Whiting was sufficient to support the finding of intentional trespass. Amoco claims that it must have intended that the oil migrate under the Class Plaintiffs' land, while Class Plaintiffs' argue, quite naturally, that the trial court was correct. Both parties rely on *Hawke v. Maus*, 141 Ind.App. 126, 226 N.E. 2d 713 (1967) to support their contentions. *Hawke* involved an intentional trespass claim against the driver of a delivery truck which struck the plaintiff's tree. From the facts of the case, it was clear that the truck driver did not intend the trespass. The main issue before the court of appeals was whether the trespass was the result of a volitional act by the driver or whether the driver was forced into the tree by the third party. Quoting the 1 RESTATEMENT (SECOND) OF TORTS § 164 cmt. a, p. 296 (1965), the court stated, "'[t]he intention which is required to make the actor liable under the rule stated in this Section is an intention to enter upon the particular piece of land in question, irrespective of whether the actor knows or should know that he is not entitled to enter.'" *Id.* 226 N.E.2d at 715. The court went on to state that "'[a]lthough it is not necessary that the trespasser intend to commit a trespass or even that he know that his act will constitute a trespass, it is required for trespass that there be an intentional act and an intent to do the

very act which results in the trespass.'" *Id.* at 716 (quoting 87 C.J.S. TRESPASS § 5, p. 960). Neither these statements nor subsequent case law do much to clarify what intent is necessary for intentional trespass.

Though it is not binding authority, we find persuasive the definition of intent the Washington Supreme Court used in *Bradley v. American Smelting and Refining*, 104 Wash.2d 677, 709 P.2d 782 (1985). *Bradley* dealt with an intentional trespass claim against a smelting plant for hazardous airborne emissions that landed on the plaintiff's land. The defendant knew that airborne emissions from its plant were landing on the plaintiff's property and those around it, but could not prevent the emissions absent discontinuing operations at the plant. Much like in *Hawke*, the court relied heavily on the RESTATEMENT (SECOND) OF TORTS in defining the requisite intent but focused on § 158 rather than § 164. Quoting from §158 sec. 8(A) (1965), the court stated that "'[t]he word "intent" is used ... to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.'" *Id.* 709 P.2d at 785. The court further stated that "'[i]ntent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.'" *Id.* (quoting 1 RESTATEMENT (SECOND) OF TORTS § 158 cmt. b, p. 15 (1965)).

We believe that the definition of intent espoused in *Bradley* correctly describes the intent discussed by the court in *Hawke*. We hold that Amoco must have intentionally committed an act that it knew or was substantially certain would result in the migration of oil onto the Class Plaintiffs' property for it to fulfill the intent element of intentional trespass. Absent some evidence of knowledge of the certain or substantially certain migration, mere intent to refine the oil was not sufficient.

Even though Class Plaintiffs requested a new trial, the trial court granted judgment on the evidence, so it is the judgment on the evidence standard of review to which we

now turn. In considering a motion for judgment on the evidence after a jury verdict, the trial court must look only to the evidence and reasonable inferences therefrom favorable to the nonmoving party. *Huff v. Travelers Indem. Co.*, 266 Ind. 414, 363 N.E.2d 985, 990 (1977). "The trial court may enter judgment only *if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim*, i.e., the evidence must point unerringly to a conclusion not reached by the jury." *Id.* (emphasis in original). A trial court may not grant judgment on the evidence if there is relevant evidence which supports the verdict because the final determination should be left to the finder of fact. *Id.* When reviewing the trial court's grant of a motion for judgment on the evidence, we employ the same standard of review as the trial court. *Coffel v. Perry*, 452 N.E.2d 1066, 1068 (Ind.Ct.App.1983).

To uphold the trial court's judgment on the evidence in this case, the evidence must point unerringly to the conclusion that Amoco knew or was substantially certain that oil would migrate onto the Class Plaintiffs' property if Amoco operated its Whiting refinery. Though the testimony is conflicting, it does not point unerringly to this conclusion. Amoco presented evidence that it employed various devices to prevent any migration of oil off its property and that it believed that these devices were effective. Amoco also presented evidence that it met all federal safety requirements and all standards set by the Indiana Department of Environmental Management. Though Class Plaintiffs claim that this evidence should be discounted, it is not the province of this court to weigh the evidence. *Huff*, 363 N.E.2d at 990-91.[11] We hold that the evidence does not point unerringly to a conclusion opposite that of the jury verdict and, therefore, the trial court erred by granting judgment on the evidence on the intentional trespass claim.

Because Class Plaintiffs did not challenge the under-

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[11] It appears that the trial court may have mistakenly applied the standard for a motion for new trial which allows the trial court to sit as the thirteenth juror and weigh the evidence. *Huff*, 363 N.E.2d at 994.

lying jury verdict on the intentional trespass claim, we now remand this issue to the trial court and order the trial court to reinstate the jury verdict.[12] *See Tancos v. A.W., Inc.*, 502 N.E.2d 109 (Ind. Ct. App. 1986), *reh'g denied, trans. denied* (court remanded with orders to reinstate jury verdict after erroneous grant of judgment on the evidence).

III. Class Plaintiffs' Claims

A. Nuisance Claim

Class Plaintiffs claim that the trial court erred when it refused to enter judgment on the evidence on their nuisance claim. Amoco counters that the trial court correctly refused to enter judgment on the evidence because the evidence does not point unerringly to the conclusion that the operation of the Whiting refinery constituted a nuisance. In our determination of this issue we employ the same standard of review as we used in Section II, *supra*. The focus of our analysis is whether the evidence points unerringly to a conclusion opposite that reached by the jury. *Huff v. Travelers Indem. Co.*, 266 Ind. 414, 363 N.E.2d 985, 990 (1977).

"The essence of a private nuisance is the use of property to the detriment of the use and enjoyment of another's property." *Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind.Ct.App. 1992). To determine whether Amoco's actions constituted a nuisance, "the relevant inquiry is whether the thing complained of produces such a condition as in the judgment of reasonable persons is naturally productive of actual physical discomfort to persons of ordinary sensibility." *Lever Bros. v. Langdoc*, 655 N.E.2d 577, 583 (Ind.Ct.App.1995). The determination of whether a nuisance has in fact occurred "is to be made by the trier of fact in light of all the surrounding facts and circumstances."

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[12] The trial court, in its order granting judgment on the evidence, also stated that Class Plaintiffs had failed to demonstrate compensable damages and awarded nominal damages in the amount of one dollar to each of the named class representatives. Both Class Plaintiffs and Amoco challenge these damages. Because we reinstate the jury verdict of no liability, the issue of damages for the trespass claim is moot and we, therefore, will not discuss it.

Wernke, 600 N.E.2d at 120.

Amoco presented evidence at trial from several experts that the levels of benzene on the Class Plaintiffs' property were not high enough to cause any short or long-term health problems or physical discomfort. Testimony by a real estate expert showed that the Class Plaintiffs' property value had not been adversely affected. Further, Stanley Dostatni, who lives in the area but who was not a member of the class, testified that he had never experienced any problems with oil on his property. There was even testimony from class representative Robert O'Drobinak that his tenant loved the house O'Drobinak rented and had moved back into the area despite the alleged underground oil. The expert testimony and testimony of Mr. Dostatni and O'Drobinak is relevant evidence that Amoco did not create a nuisance. Because there is conflicting relevant evidence that does not point unerringly to the conclusion opposite that reached by the jury verdict, the trial court was correct in denying Class Plaintiffs' request to enter judgment on the evidence on the nuisance claim.

B. Dismissal of Absent Class Members

Class Plaintiffs next claim that the trial court erred when it dismissed absent class members who failed to return a discovery questionnaire. Arguing that absent members of a class are not subject to discovery, Class Plaintiffs ask us to find this dismissal erroneous, reverse the jury verdicts, and order a new trial. Amoco argues that the questionnaire was a proper discovery tool and that absent class members are subject to discovery. Because we find any error that occurred to be harmless, we need not address these claims.[13]

"An error is harmless if it does not affect the substantial rights of the parties." *Bonnes v. Feldner*, 642 N.E.2d 217, 219 (Ind.1994). Class Plaintiffs do not attempt to argue how the absent class members, who have made no effort to

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[13] We are assuming error occurred only because we find the harmless error issue to be dispositive and do not offer any opinion as to the correctness of the dismissal of the absent members.

intervene at the appellate or trial level, were prejudiced by their dismissal. In fact, Class Plaintiffs admit in their Appellant's Brief that the absent members may have no interest at all in the present litigation. We also note that because we have reinstated the jury verdict of no liability, had the absent class members not been dismissed, they would be in the same position they are now, i.e., precluded from further litigating these claims. We, therefore, hold that any error that occurred was harmless and we decline to reverse the jury's verdict.

C. Exclusion of Evidence of Fear, Fires and Explosions

Class Plaintiffs next argue that the trial court erred when it granted Amoco's motion in limine to prevent testimony about Class Plaintiffs' fear of fire and explosions, and testimony about fires and explosions that have occurred at the Whiting refinery. Arguing that this evidence was relevant and could have led the trial court to grant judgment on the evidence on the nuisance claim, Class Plaintiffs ask us to reverse the trial court order and remand for a new trial. Amoco counters that the proposed testimony was irrelevant because it dealt with occurrences unrelated to the underground migration of oil and was prejudicial. While we agree that reversal is not required, we base our decision on reasons different from those proffered by Amoco. "Where evidence is erroneously excluded, reversal is justified only if the error relates to a material matter or is of such character as to substantially affect the rights of the parties." *Manns v. State Dept. of Highways*, 541 N.E.2d 929, 936 (Ind.1989). For the purposes of this issue only, we will assume that the trial court erred in granting the motion in limine and excluding the evidence. The only harm that Class Plaintiffs claim was caused by the exclusion of this evidence was "that evidence *may* even have prevented the Court from finding a nuisance when it corrected the jury's verdict." Appellant Brief of Class Plaintiffs, p. 63 (emphasis added). As we discussed in section III. A., *supra*, Amoco presented enough conflicting evidence concerning the nuisance claim to preclude judgment on the evidence. The admission of this additional evidence of fear, fires, and explosions does not

change the fact that this conflicting relevant evidence was sufficient to preclude judgment on the evidence. Class Plaintiffs also fail to explain how this additional testimony would have changed the jury's verdict. Because the exclusion of this evidence did not substantially affect the rights of the Class Plaintiffs, reversal is not justified. *Manns*, 541 N.E.2d at 936.

D. Independent medical exams

In its final claim of error, Class Plaintiffs argue that the trial court erred by conditioning testimony about physical discomfort claims upon the witnesses' submission to IMEs and by excluding the testimony of those who did not submit to the examinations. Once again, Class Plaintiffs fail to claim any prejudice or harm, simply stating that the trial court's actions were erroneous. Because we find any error that occurred to be harmless, we need not discuss the merits of this claim.

"An error is harmless if it does not affect the substantial rights of the parties." *Bonnes v. Feldner*, 642 N.E.2d 217, 219 (Ind.1994). Because Class Plaintiffs make no claim of harm, we will discuss the effect the exclusion of evidence would have had on damages and on the trial court's decision not to grant judgment on the evidence.[14] We first note that any claim of prejudice in relation to damages is moot because we have reinstated the jury's verdict of no liability on all claims. Turning now to the claim that this evidence would have affected the trial court's decision not to grant judgment on the evidence on the nuisance claim, we hold that this claim must fail as well. As we discussed in Sections III. A. and C., *supra*, the existence of further evidence of a nuisance does not counteract the relevant conflicting evidence that no nuisance existed. This conflicting evidence was sufficient to preclude the trial court from granting judgment on the evidence on the nui-

[14] We limit our discussion to these two issues because we fail to see how the excluded evidence of alleged transitory physical discomfort caused by the underground oil is relevant to any of Class Plaintiffs' other claims.

sance claim.

Because the damages issue is moot and the trial court's decision on the nuisance claim would not have been changed by the excluded evidence, we hold that any error was harmless. We, therefore, decline to reverse the trial court's decision to exclude this testimony.

Conclusion

As to the trial court's grant of judgment on the evidence on the trespass claim, we reverse and remand to the trial court to reinstate the jury verdict. In all other aspects we affirm the judgment of the trial court.

Reversed and remanded in part, and affirmed in part.

STATON and DARDEN, JJ., concur.

Appendix D

State of Indiana) In the Newton Circuit Court
) SS:
County of Newton) 1993 Term

James Martin, Mary Roman, Eugene Burkat, Jr., and Wanda Burkat, Individually and on Behalf of All Other Similarly Situated, Plaintiffs,

v.

Amoco Oil Company, Defendant
Cause No. 56C01-9105-CT-67

Order Certifying a Property Class
Under Indiana Trial Rule 23(B)(1)

The Court, having reviewed the pleadings and memoranda and other evidence submitted by counsel for the parties, and after due deliberation, finds as follows:

1. The proposed Class satisfies the prerequisites of Indiana Trial Rule 23(A) because (1) the plaintiffs are so numerous as to make joinder impractical; (2) important issues of law and fact are common among the class members; (3) the class representatives' claims are typical of the class members' claims respecting certain class issues, and (4) class representatives and class counsel will adequately represent absent class members.

2. This litigation, seeking injunctive relief and compensatory and punitive damages, involves property rights respecting a claimed nuisance. This action and other related litigation raise certain core issues of law and fact that should be adjudicated in one proceeding. Because the pendency of individual suits raises the possibility of inconsistent adjudications affecting plaintiffs' and Amoco's property rights and future operations, the Proposed Class satisfies the requirements of Indiana Trial Rule 23(B)(1)(a).

3. Moreover, the presence of multiple lawsuits could lead to an inequitable distribution of any punitive damages, were they to be awarded. Accordingly, the proposed class satisfies the requirements of Rule 23(B)(1)(b) which per-

mits certification where an award to one plaintiff might impair the ability of other plaintiffs to protect their interests.

Accordingly, in this litigation arising from alleged underground migration of petroleum related products ("hydrocarbons") from Amoco's Whiting, Indiana Refinery to other property, the following class is initially certified pursuant to Indiana Trial Rule 23(B)(1): approximately 500 residents or property owners near the Amoco Whiting Refinery who were contacted by Amoco through a January 23, 1991 letter in which Amoco sought approval to test groundwater and conduct air monitoring in nearby residences.

For the purposes of this order, a business or partnership or other entity that received a notice or questionnaire from Amoco is included in the class.

The Court further finds that certain core issues common to the class shall be resolved for the class as a whole in one trial. These "Class Issues" include: (i) whether Amoco is liable for its operation of the Refinery under theories of nuisance, trespass, negligence, strict liability or violations of state or federal statutes. (ii) whether punitive damages should be awarded and, if so, the amount. (iii) whether the class is entitled to attorneys' fees, expert fees, interest, or costs.

The class action jury will award compensatory damages and medical monitoring costs, if any, to the representative plaintiffs.

If Amoco is found liable to the Class, "individual issues" pertaining to the absent class members shall be resolved in mini-trials consisting of several plaintiffs. The relevant individual issues would be fully determined later but include at a minimum (1) whether the plaintiff is a member of the class, (2) whether the plaintiff suffered cognizable injuries, including a nuisance or trespass, (3) whether the alleged underground migration of hydrocarbons caused those particular injuries, and (4) the amount of compensation to be awarded the plaintiff because of those injuries. At the mini-trials, a judge or jury will award any compensatory damages to the plaintiffs, and a plaintiff receiving compensatory damages, whether by award or settlement,

will be entitled to share in any punitive damages awarded by the class action jury.

Notice of this class action in the form of the attached "Notice of Class Action" is to be served upon the members of the class by inclusion of it in the next issue of the Amoco Communicator.

DONE and ORDERED this _23rd_ day of _January_, 1992.

___/S/ Marvin D. McLaughlin___
Circuit Judge

NOTICE OF CLASS ACTION

TO: The approximately 500 residents or property owners near the Amoco Whiting Refinery who have been contacted by Amoco and/or sent questionnaires by Amoco seeking to test on their property.

You are hereby notified, pursuant to Court Order, that a class action has been certified in legal proceedings entitled James Martin, et al., Plaintiffs vs. Amoco Oil Company, Defendant. The plaintiff class as certified by this Court on the _23rd_ day of _January_, 1992, includes:

> The approximately 500 residents or property owners near the Amoco Whiting Refinery who were contacted by Amoco through a January 23, 1991 letter in which Amoco sought approval to test groundwater and conduct air monitoring in nearby residences.

You are being notified in the belief that you may be a member of the above-described plaintiff class. This notice briefly describes this litigation.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OF ANY CLAIMS OR DEFENSES ASSERTED BY EITHER PLAINTIFFS OR DEFENDANT. IT IS GIVEN FOR THE SOLE PURPOSE OF INFORMING YOU OF THE EXISTENCE OF THIS CLASS ACTION.

DESCRIPTION OF THE LITIGATION

Plaintiffs, on behalf of all class members, seek to hold all responsible parties liable for punitive damages as a consequence of any migration of oil from under the Amoco Whiting Refinery to certain residential property located near the refinery. Amoco is currently having tests done to determine if there has been actual migration from its refinery site and, if so, the extent of such migration, and whether it caused any damage.

If there is an award of punitive damages against the defendant, the award will be shared among all those class members who suffered actual injuries. To share in any punitive damage recovery, however, a class member must recover compensatory damages either by litigation or settlement. Distribution of any punitive damage award may be delayed until all class members have litigated or settled any compensatory damage claims they may have.

The Court has designated the following attorneys as class counsel to represent the class in this litigation:

Ruman, Clements & Tobin, P.C.
5261 Hohman Avenue
Hammond, Indiana 46320
Telephone: 219-933-7600

In this class action, Amoco's liability for punitive damages, if any, will be determined on behalf of the entire class in this proceeding. You should be aware of the following:

1. As a member of the plaintiff class, you will share in the benefits of any judgment favorable to the class, or any settlement entered into between the class and the defendant. You will be bound by any judgment favorable to the defendant and adverse to the class. You will still retain the right to attempt to prove and settle any claim for compensatory damages you may have directly with the defendant. If the recovery or judgment in this class action is beneficial to the class, the plaintiffs, class attorneys will petition the Court for an award of attorneys' fees and reimbursement of their cost to be paid out of the amount recovered for the class. Any award of attorneys fees or any proposals to settle the

case, on a class-wide basis, will be ruled on by the Court only after the class members have been given an opportunity to be heard on the matter.

2. You may enter an appearance in this class action through counsel of your choosing. Unless notice of such a separate appearance is postmarked or received by the Clerk of the Court within 30 days of the date shown on this notice, you will be represented by the attorneys for the class named above.

___/S/ Marvin D. McLaughlin___
Circuit Judge

Appendix E

State of Indiana) In the Newton Circuit Court
) SS:
County of Newton) 1993 Term

James Martin, Mary Roman, Eugene Burkat, Jr., and Wanda Burkat, Individually and on Behalf of All Other Similarly Situated, Plaintiffs,

v.

Amoco Oil Company, Defendant
Cause No. 56C01-9105-CT-67

Pre-Trial Orders of 4-14-93 Filed April 26, 1993

Saul Ruman and all associates, John Ryan and all associates, and Richard Komyatte and son are all in Court and pre-trial conference is held. The following rulings are made:

1. All motions regarding the physical exam of Mary Roman in Indianapolis are heard. The Court orders that defendant shall arrange an appointment at the I. U. Medical Center sufficiently in advance that said plaintiff can arrange her schedule and plaintiff shall present herself in Indianapolis for said exam.

2. Plaintiff's Motions to Add Health Claims of Murzyn, Bonnie Finley, and others heretofore named, and all objections are argued.

The Court orders plaintiffs' counsel to, within 30 days, furnish to the Court affidavits for each said claimant stating unequivocally A. why the deadline for filing same was not met and B. showing prima facially a connection between the alleged condition of the claimant and the actions of the defendant.

3. The Motion to Extend Time for Filing Medical Authorization of Steve and Rose Ivanovich was granted on 2-23-93.

4. Defendants' discovery motion regarding Minniti Real Estate Co. and all objections and Motions to Quash are submitted. The Motions to Quash are sustained and defen-

dants' motion is overruled unless Mr. Minniti is listed as a witness. In that event, regular rules of discovery would apply to the field of his testimony only.

5. Plaintiffs' Motion to Add New Expert After Deadline and all objections thereto are argued. Court permits the name of Richard Spector to be added. Court further grants defendants 60 days to add an expert of their own if desired.

6. Plaintiffs' Motion for Protective Order Regarding Absent class Members, to prevent defendants from taking depositions from said members and from having ex-parte conversations with members' medical doctors is submitted. Arguments are heard and the issue is broadened to cover other aspects of discovery regarding the absent class.

On the issue of punitive damages, plaintiff states for the record that no evidence will be introduced regarding the effect of defendant's actions upon absent class members. Said effect upon named class members and listed witnesses is admissible.

Obviously, regular discovery may be had of any listed witness or named party.

The present class consists of approximately 500 households, some of which are making no claim. In order to facilitate discovery, the Court orders plaintiffs to within 30 days file with the Court, two lists. One list shall contain the names of all persons in the class who are making medical claims and the other list shall contain the names of all persons in the class who are making property damage claims including reduction of value claims. Theoretically, some of the same names could be on both lists. Any person whose name is not contained on either list, may be talked to by defendants without restriction.

7. Plaintiffs' Motion for Order Preventing Those Desiring to "Opt-out" from Filing Repetitive Motion, is sustained. The Court overrules any pending "opt-out" motions and orders that none shall be refiled as these have been heard on numerous, previous occasions.

This prevent order does not apply to the present petition to establish sub-classes as the Court in its order signed 6-24-92 and stamped 6-29-92 specifically permitted same.

8. Other motions remaining to be ruled upon are 1. whether this is a bench or jury trial. 2. Motion to Establish Sub-classes. 3. Motion to Amend Order of 2-23-93 and other case management orders. 4. Motion under TR 36 7 37 for Sanctions and Admissions. The Court finds that these are case management and trial issues which should be determined by the judge who is to try this cause.

The present judge finds that he must recuse himself; and therefore, said issues are left for the newly selected judge.

9. Marvin D. McLaughlin, the Special Judge in this cause, does now recuse himself and will name a panel from which the parties may strike if they cannot agree on a judge. There will only be two strikes if they cannot agree on a judge. There will only be two strikes, one by plaintiffs' counsel and one by defendants'.

_____/S/_____
Marvin D. McLaughlin
Special Judge

Appendix F

State of Indiana)
) SS:
County of Newton) In the Newton Circuit Court
1993 Term

James Martin, Mary Roman, Eugene Burkat, Jr., and Wanda Burkat, Individually and on Behalf of All Other Similarly Situated, Plaintiffs,

v.

Amoco Oil Company, Defendant
Cause No. 56C01-9105-CT-67

Order on Class Member's Motion to Set Aside and Vacate Mandatory Class Certification Order Or, in the Alternative, to Set a Hearing to Reconsider Whether Martin Should Continue as a Mandatory Class or an Opt out Class

The Court, having examined the Class Member's Motion to Set Aside and Vacate Mandatory Class Certification Order Or, in the Alternative, to Set a Hearing to Reconsider Whether Martin Should Continue as a Mandatory Class or an Opt out Class now denies same.

All of Which Is Ordered this 23rd Day of November, 1993.

/S/
HONORABLE ROBERT B. SMART
Judge, Newton Circuit Court

Appendix G

State of Indiana) In the Newton Circuit Court
) SS:
County of Newton) 1993 Term

James Martin, Mary Roman, Eugene Burkat, Jr., and Wanda Burkat, Individually and on Behalf of All Other Similarly Situated, Plaintiffs,

v.

Amoco Oil Company, Defendant
Cause No. 56C01-9105-CT-67

Final Judgment Order and Judgment on the Verdict

1. This action came before this Court for trial by jury. The Honorable Robert B. Smart, Judge of the Newton Circuit Court presided.

2. The class members consist of "the approximately 500 residents or property owners near the Amoco Whiting Refinery who were contacted by Amoco through a January 23, 1991 letter in which Amoco sought approval to test groundwater and conduct air monitoring in nearby residences." See Order Certifying a Property Class Under Indiana Trial Rule 23(B)(1) p. 3. The class was represented by counsel. The Defendant Amoco Oil Company was represented by counsel.

3. This Court has jurisdiction over the Parties and this action pursuant to Indiana Trial Rule 4(A).

4. The following issues were tried before the Court and the jury and verdicts were rendered thereon:

A. Whether Amoco is liable for its operation of the Refinery under theories of nuisance, trespass, negligence, strict liability or violations of state or federal statutes.

B. Whether punitive damages should be awarded.

C. Compensatory damages and medical monitoring costs, if any, to the class representatives.

WHEREFORE IT IS HEREBY ORDERED, ADJUDGED

AND DECREED: that based upon the jury verdict rendered in favor of the Defendant, Amoco Oil Company, and against the class representatives and the class on all issues submitted, the class representatives and the class shall take nothing, that judgment on the merits of this action is entered in favor of Amoco Oil Company and against the class representatives and the class, and for the costs of this action.

All of Which Is Ordered this 14th Day of December, 1993.

/S/
HONORABLE ROBERT B. SMART
Judge, Newton Circuit Court

Appendix H

State of Indiana) In the Newton Circuit Court
) SS:
County of Newton) 1993 Term

James Martin, Mary Roman, Eugene Burkat, Jr., and Wanda Burkat, Individually and on Behalf of All Other Similarly Situated, Plaintiffs,
v.
Amoco Oil Company, Defendant
Cause No. 56C01-9105-CT-67

Order on Motion to Correct Errors Filed upon Plaintiffs/Intervenors and Subsequent Motions Filed Incidental Thereto

The Motion to Correct Errors filed upon behalf of the Plaintiffs/Intervenors having been argued to the Court on March 21, 1994 and the Court having taken said matter under advisement, the Court now DENIES the Motion to Correct Errors filed upon behalf of the Plaintiffs/Intervenors.

It is further ORDERED that the Motion of Plaintiffs/Intervenors to Strike the Statement in Opposition filed to the Motion to Correct Errors filed upon behalf of the Defendant is GRANTED.

It is further ORDERED that the Motion to Strike the Motion to Correct Errors of the Plaintiffs/Intervenors filed upon behalf of the Defendant is DENIED.

It is further ORDERED that the motion to strike the defendant's submission of evidence subsequent to the trial relating to the payment of the motel bill incurred by Henry Cornelius is hereby GRANTED.

All of Which Is Ordered this 1st Day of August, 1994.

/S/
HONORABLE ROBERT B. SMART
Judge, Newton Circuit Court

Appendix I

State of Indiana) In the Newton Circuit Court
) SS:
County of Newton) 1993 Term

James Martin, Mary Roman, Eugene Burkat, Jr., and Wanda Burkat, Individually and on Behalf of All Other Similarly Situated, Plaintiffs,
v.
Amoco Oil Company, Defendant
Cause No. 56C01-9105-CT-67

Order on Motion to Correct Errors Filed on Behalf of the Plaintiffs and Subsequent Motions Filed Incidental Thereto

This Cause having been argued to the Court on March 21, 1994 and the Court having taken said matter under advisement, the Court now finds as follows:

1. That the Defendant admits through statements of counsel and requests for admissions that oil has migrated from the refinery site to the properties of named Plaintiffs, Henry Cornelius, James Martin, and Mary Roman.

2. That although the Defendants may not have intended that the oil migrate on to the property of the above mentioned individuals, the Defendant did intend that oil should be refined and stored upon the Amoco Refinery Site in Whiting, Indiana.

3. That the Defendant did trespass upon the properties of Henry Cornelius, James Martin, and Mary Roman.

4. That the Plaintiffs failed to prove that James Martin, Mary Roman, and Henry Cornelius sustained compensatory damages as a result of the acts of the Defendant.

5. That inasmuch as the Plaintiffs have proven the above mentioned trespass, they are entitled to nominal damages which the Court now sets in the sum of One dollar ($1.00) as to property owned by Henry Cornelius and One dollar ($1.00) as to property owned by James Martin and

Mary Roman.

Be it therefore ORDERED and ADJUDGED that the judgment in this case should be corrected as follows:

a. Judgment for plaintiff, Henry Cornelius as to his trespass claim in the sum of One dollar ($1.00) as nominal damages entered accordingly.

b. Judgment for plaintiffs, James Martin and Mary Roman as to their trespass claim in the sum of One dollar ($1.00) as nominal damages entered accordingly.

It is further ORDERED that the Plaintiffs Motion to Strike the Statement in opposition to their motion to correct errors is GRANTED.

In all other respects, the Motion to Correct Errors filed pursuant to Ind. T.R. 50 and 59 is denied.

All of Which Is Ordered this 1st Day of August, 1994.

/S/
HONORABLE ROBERT B. SMART
Judge, Newton Circuit Court

Appendix J

Indiana Trial Rules. Rule 23. Class actions

(A) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

(C) Determination by order whether class action to be maintained—Notice—Judgment--Actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court, upon hearing or waiver of hearing, shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(a) the court will exclude him from the class if he so requests by a specified date;

(b) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate:

(a) an action may be brought or maintained as a class action with respect to particular issues; or

(b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(D) Orders in conduct of actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the

presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time. The court shall allow reasonable attorney's fees and reasonable expenses incurred from a fund recovered for the benefit of a class under this section and the court may apportion such recovery among different attorneys.

(E) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Note: Under *State ex rel. Harris v. Scott Circuit Court*, 437 N.E. 2d 952 (Ind. 1982) "Indiana courts should look to federal law for guidance in certifying class actions."

Appendix K

Indiana Trial Rule 75. Venue Requirements

(A) Venue. Any case may be venued, commenced and decided in any court in any county, except, that upon the filing of a pleading or a motion to dismiss allowed by Rule 12(B)(3), the court, from allegations of the complaint or after hearing evidence thereon or considering affidavits or documentary evidence filed with the motion or in opposition to it, shall order the case transferred to a county or court selected by the party first properly filing such motion or pleading if the court determines that the county or court where the action was filed does not meet preferred venue requirements or is not authorized to decide the case and that the court or county selected has preferred venue and is authorized to decide the case. Preferred venue lies in:

(1) the county where the greater percentage of individual defendants included in the complaint resides, or, if there is no such greater percentage, the place where any individual defendant so named resides; or

(2) the county where the land or some part thereof is located or the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto or relating to such land or such chattels, including without limitation claims for recovery of possession or for injuries, to establish use or control, to quiet title or determine any interest, to avoid or set aside conveyances, to foreclose liens, to partition and to assert any matters for which in rem relief is or would be proper; or ...

(4) the county where either the principal office of a defendant organization is located or the office or agency of a defendant organization or individual to which the claim relates or out of which the claim arose is located, if one or more such organizations or individuals are included as defendants in the complaint....

Appendix L

Indiana Trial Rule 76. Change of Venue

The version of the Rule that governs this case reads as follows: "In all civil actions, *except those to enforce a statute defining an infraction* where a change may be taken from the judge, *or the county,* such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to *only one [1] change from the county and* only one [1] change from the judge. After a final decree is entered in a dissolution of marriage case, a party may take only one change of judge in connection with petitions to modify that decree, regardless of the number of times new petitions are filed. The Rules of Criminal Procedure shall govern proceedings to enforce a statute defining an infraction."

As noted in the Petition, the Supreme Court of Indiana amended this Rule on Dec. 6, 1991. The amended version removed the words italicized above. The new version reads as follows: "In civil actions where the venue may be changed from the county, such change of venue from the county may be had only upon the filing of a verified motion specifically stating the grounds therefor by the party requesting the change. The motion shall be granted only upon a showing that the county where suit is pending is a party or that the party seeking the change will be unlikely to receive a fair trial on account of local prejudice or bias regarding a party or the claim or defense presented by a party. A party shall be entitled to only one change of venue from the county. Denial of a motion for change of venue from the county shall be reviewable only for an abuse of discretion. The Rules of Criminal Procedure shall govern proceedings to enforce a statute defining an infraction." This version of Trial Rule 76 became effective Feb. 1, 1992.

Appendix M

Indiana Trial Rule 79. Special Judges: Selection

Hereafter whenever in any judicial proceeding, whether civil, statutory or criminal, except in actions under Trial Rule 60.5, in any court it shall become necessary to select a special judge, the exclusive manner of selection shall be as follows:

(1) Whenever the regular judge or presiding judge of any court or spouse of such judge, or a person within the third degree of relationship to either of them, or the spouse of such person (a) is a party to the proceeding or an officer, director or trustee of a party, or (b) is acting as a lawyer in the proceeding, or (c) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding, the venue of which is before such judge, the judge shall disqualify immediately and, except as provided in section 8 of this rule, shall cause such fact to be certified to the Supreme Court which shall thereupon appoint a special judge. In all other instances of disqualification, the judge shall submit a list of three persons for striking as set forth in section 4 of this rule.

(2) In an adversary proceeding the parties shall endeavor in good faith to agree and any person, eligible as hereinafter defined, who shall be designated by their agreement shall be appointed. Provided, however, that the provisions of this section shall not apply in any criminal proceeding or matter, nor an election contest involving the nomination or election of the judge of the court in which such contest is filed.

(3) If the parties fail to or have no right to agree upon an appointee as provided for in section (2), the parties may agree or the party in an ex parte proceeding may consent to the selection and appointment of a special judge by the judge before whom the case is then pending or, if there be no such judge, by the regular judge of the court wherein said proceeding is pending.

(4) Except as provided in section 8 of this rule, if neither method provided for by sections (2) or (3) for the se-

lection of a special judge be adopted, then the presiding judge, or if there be no such judge, the regular judge of the court, shall submit a list of three (3) persons from which, by striking, an appointee may be selected. In an adversary proceeding each party shall strike one (1) name and in an ex parte proceeding said party shall be entitled to strike one (1) name from such list. The moving party shall strike first. From the name or names remaining the judge submitting such list shall select and appoint the special judge. In cases other than those enumerated in section (1) where a judge on his own motion disqualifies himself, the plaintiff side shall strike first.

(5) If a special judge selected by any of the means aforesaid shall not within twenty (20) days after the appointment appear and qualify, the failure so to do shall revoke the appointment and it shall be the duty of the presiding judge, or if there be none, the regular judge of the court, to select another as such special judge in the same manner as is herein provided for the selection of the special judge. [emphasis added]

(6) Except as provided in section 8 of this rule, if, after two (2) panels for the appointment of a special judge have been submitted for striking, and when, after striking from such second panel, a special judge has been named, but, after twenty (20) days the judge so selected has failed to qualify or, having qualified has become disqualified, such facts shall be certified to the Supreme Court which shall thereupon appoint a special judge.

(7) In the event a special judge who has assumed jurisdiction of a cause ceases to act as special judge, other than by reason of the filing of a motion for change of judge, or a judge appointed by the Supreme Court does not qualify within twenty (20) days of appointment, the current regular judge of the Court may assume jurisdiction if such regular judge was not the person from whom the initial change of judge was taken and such regular judge is otherwise qualified to serve. When the regular judge does not assume jurisdiction under this provision, the cause shall be certified to the Supreme Court for the appointment of another special judge....

Appendix N

Indiana Appellate Rule 11(B)(3)

The opinion or memorandum decision of the Court of Appeals shall be final except where a petition to transfer has been granted by the Supreme Court. If transfer be granted, the judgment and opinion ... of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court.

Appendix O

Population by Race: Lake County and Newton County
(Based on 1990 Census Data)

Name of County	WHITE population 1990
Lake IN	334,203
Newton IN	13,436

Name of County	BLACK Population 1990
Lake IN	116,688
Newton IN	9

Name of County	AMERICAN INDIAN, ESKIMO OR ALEUT 1990
Lake IN	865
Newton IN	39

Name of County	ASIAN OR PACIFIC ISLANDER 1990
Lake IN	2,772
Newton IN	24

Name of County	HISPANIC ORIGIN
Lake IN	44,526
Newton IN	177

	PERCENT OF TOTAL POPULATION
Lake IN	9.4%
Newton IN	1.3%

Source: County and City Data Book,
University of Virginia Library
Charlottesville, Virginia
(http://fisher.lib.virginia.edu/ccdb)

Appendix P

Amoco Oil Company
Whiting Refinery
2815 Indianapolis Boulevard
Whiting, Indiana 46394

January 23, 1991

Dear Resident:

Amoco Oil Company has reason to believe that petroleum products beneath its Whiting refinery have moved beyond its property underground. As a result, Amoco is seeking approval to test the groundwater under the community and conduct air monitoring in nearby residences.

Amoco does not believe the situation poses an immediate safety or health hazard for people living near the refinery. However, as a precaution, and to reassure you, we are offering to monitor the air in homes located in the proposed test area. Your residence is located in this area, which extends from the refinery to Birch Avenue, between 121st and 129th streets, as well as the area bounded by Front Street, 119th Street, and Standard Avenue. The monitoring will be done at no cost to you and only if you request it.

Amoco is committed to working with state and local officials to determine the extent of the petroleum underground and developing and implementing a comprehensive plan to remediate the affected area. We also are committed to working to prevent future leaks or spills.

The proposed community groundwater investigation is an extension of Amoco's program, begun in late 1989, to study the groundwater under the refinery. The petroleum leaked underground during the refinery's 102-year history and now rests on groundwater, which appears to have carried it underground beyond Amoco's property. Consequently, Amoco has begun talks with local officials in Whiting and Hammond to gain permission to install groundwater monitoring wells an public property, including alleys and streets, to determine if the area affected is a few

feet or a few blocks.

I'm sure one of your first questions is, "Should I be concerned?" We do not believe this situation poses an immediate safety or health hazard. We do not believe there is danger of explosion. Levels that can cause fire or explosion are usually accompanied by a strong odor of gasoline or oil. However, please let us know if you smell a petroleum odor in your basement, or if you see oil in your basement sump.

Secondly, groundwater in this area is not used for drinking water. As a city resident, you receive your drinking water from Lake Michigan, via a municipal water system. Our studies indicate that Lake Michigan water has not been adversely affected by the underground petroleum. However, if you are using well water at your home for any reason, we ask that you notify us so we can test that water as a precaution.

Thirdly, you may be concerned about possible exposure to benzene, one of the components of gasoline. Homes contain a certain amount or "background level" of benzene, which is found in typical urban air. We have monitored the air in a home in the northwest corner of the test area. Elevated levels of benzene were not detected, nor were petroleum products found in the sump water. While exposure to low levels of benzene does not pose an immediate health hazard, we would like to monitor the air in homes in the test area. We currently are working with state and local health officials to get their concurrence on methods and standards.

The enclosed fact sheets give you an overview of the situation and more information about the air monitoring program, including how to set up an air monitoring appointment. Also enclosed is a questionnaire we would like you to complete. This will give our environmental consultants information they need for their study. If you plan to have the air in your home monitored, give this questionnaire to the representatives visiting you. If you do not plan to schedule an air monitoring visit, please return the questionnaire in the enclosed envelope.

We have informed The Indiana Department of Environmental Management, the Environmental Protection

Agency, and local and state government and health officials about our findings and our monitoring programs.

We are sorry for any inconvenience this might cause you. If you have any questions, please contact us at 1-800-233-0003, ext. 475.

Sincerely,

Frank J. Citek
FJC/meb
Enclosures

Appendix Q

"Massive Underground Oil Spill Slowly Spreads from Whiting," *Hammond Times* 1/24/91

Residents near refinery say stink is a big nuisance
By KEVIN VOIGT Times Correspondent

WHITING - In the shadow of huge oil storage tanks believed to be responsible in part for leaking millions of gallons into the ground, residents along a few blocks of Schrage Avenue are frightened.

They, along with hundreds of their neighbors, received a letter from Amoco Oil Co. saying the company believes oil has seeped underground and into neighborhoods surrounding the plant.

Besides groundwater testing, the company offers to test the air in homes for levels of benzene and combustible gas. The letter provides a self-addressed, stamped envelope and a questionnaire.

Five residents interviewed Wednesday night said they will allow the home testing. Four have reported gaseous smells or oil in their basements during the last several years, and all are nervous about the possible health hazards.

"We're a little scared ... We have a baby on the way, and we don't know what to think," said Kevin Hansen, of 2626 Schrage. His wife, Kim, is expecting their first child next week.

Hansen, a life-long Whiting resident, said that after the rain in November, the smell of oil was thick in the air. "it smelled like we were standing next to a gas pump, like you didn't want to strike a match," he said.

Residents said smells often accompanied heavy rains. In August, Mary Perrine, of 2824 Schrage, had a foot of water in her basement topped with a sheen of oil. When she turned on a light, "it was like a rainbow," she said.

In James Martin's house, at 2842 Schrage, the subtle smell of gas is a constant nuisance.

"It's been like this on and off for the last five or six years," he said. "You get used to it, then when you leave the

house and come back, it knocks you out. It gives us bad headaches."

For the last several months, he has contacted a number of state and federal agencies, form the lake County Board of Health to the Environmental Agency to the office of Sen. Dan Coats, R-Ind., about the gassy smell.

Dotty Nogovetich, manager of Just Dotty's Bar and Grill, has had a gaseous odor in the basement of her restaurant for four years. She had Amoco inspect it then, and they told her the mell was harmless.

"I get a definite odor, and we were told it was sewer gas.," she said. When she reviewed the materials form Amoco Wednesday, her first thought was, "Are we safe?"

"I guess that's the risk you take living near a refinery," she said, "but you just don't think about it."

Amoco vows to clean up mess

By REBECCA VICK Times Staff Writer

WHITING - Amoco Oil Co. officials Wednesday acknowledged that a portion of Northwest Indiana around its Whiting refinery sits atop a massive underground sea of oil that has slowly accumulated through leaks and spills.

The enormity of the petroleum leaching through the soil in parts of Whiting, Hammond and East Chicago was estimated by those officials at 16.8 million gallons — roughly twice the amount of oil leaked into the sea in Alaska by the Exxon Valdez two years ago.

While the threat posed by the oil in the sea is clear, what a 100-plus-year accumulation of petroleum products under homes and businesses in three cities means is unclear.

While Amoco officials told residents of the area in a letter delivered Wednesday that they do not believe the pool of oil poses a particular threat, the company did indicate it will attempt to clean up the mess.

The amount of leaked oil, equivalent to 400,000 barrels, is staggering. The Valdez tanker spill in March 1989, at 10.9 million gallons, pales by comparison.

"It's massive; it's just massive," said the U.S. Environmental Protection Agency's Kenneth Burch, manager of

Illinois' underground storage tank program. "Let's put it this way: The average underground storage tank at service stations only holds 10,000 gallons."

Amoco Refinery Manager Frank Citek said oil started leaking as early as 100 years ago when wooden tank bottoms grew worn and hand gauges routinely miscalculated tank levels. Tanks have since been replaced by all steel, and monitoring is done electronically. Containment vessels installed along Amoco's borders over recent years are designed to prevent additional oil from leaving the property, Citek said.

In a letter hand-delivered Wednesday to the residents of some 500 homes, Amoco said it "does not believe the situation poses an immediate safety or health hazard for people living near the refinery." The company nonetheless is seeking permission to sample the air in people's homes for explosive levels of petroleum vapors and test the groundwater under the community.

Amoco Regulatory Director Patricia Wright said initial data indicate that homes most likely do not harbor dangerous vapors, and the company does not believe oil extends beyond the test area.

"In testing for oil, we have gone beyond what we think are our best guesstimates of the area affected," Wright said. "We do think it's gone off our property. Whether it's a few feet or a few blocks, we'll have to determine that."

While there are stiff penalties for companies that leak petroleum products into waterways, there are few statutes or regulations about spills like the one at Amoco. If such a spill is proved a threat to surrounding residents, the EPA and state agencies can act. However, any such action in this case could only follow additional investigation.

Earlier this month, one Schrage Avenue resident reported a gasoline-like stench in his home on the 2800 block. Fire and Amoco officials were called to the scene and found a nearby curb drain filled to the brim with an oily substance. Amoco is testing the material to determine whether it came from its property.

And Indiana Department of Environmental Manage-

ment records show that in 1984, residents of East Chicago's Marktown neighborhood reported strong petroleum odors coming from storm sewers along several streets there. IDEM questioned Amoco but officials could not determine whether petroleum had seeped from the plant.

Amoco will use a system of recovery wells, wellpoints and so-called french drains to recover the oil, including oil found beneath homes. Those technologies can capture only 25 percent; the rest will be mopped through several other methods, including naturally occurring bacteria enhanced with nutrients and oxygen.

"I think it's very refreshing they have offered to do this," said Walter Nied, an emergency response on-scene coordinator for the EPA in Chicago, who confirmed Amoco's claim that the move to test the area and reclaim the oil is voluntary. Federal laws regulating contamination cleanups exempt oil spills unless they reach navigable waters.

Sandy Medley, Amoco's environmental coordinator, said tests show Amoco's oil has not reached Lake Michigan to the north and George Lake Canal to the south even though she pointed out that groundwater beneath the plant flows in several directions, including north toward the lake and south toward the canal. Nied said EPA tests show the canal is saturated with all kinds of contaminants, including oil.

"We know there are large volumes of oil under the entire area," Nied said. "Finally Amoco not only is going public (with its contribution to the problem), but will evaluate if there is any impact on humans. The more they pump the better it will be for people's health because benzene is a health threat."

Amoco also intends to test homes for the chemical benzene, a petroleum byproduct that is released into the air primarily through the distribution and use of petroleum products. The United States produces more benzene — 8 million tons annually — than any other chemical. Long-term exposure in the workplace can cause leukemia and high dosages are fatal. Most people are exposed to it when

they pump gasoline at service stations.

The EPA's Steve Faryan, another emergency responder, said companies involved in reclaiming lost oil often paint a picture of doing it solely for the public good. "They reclaim oil using wells, pump it through oil and water separators and then put it back into refinery operations," he said.

"Amoco has been able to recover up to 1 percent of their fuel, which is cost-effective because it pays back recovery costs." He added that recovering lost oil has been part of Amoco's routine operations for years.

The company has slated two testing areas where it will scatter about 40 groundwater wells: one in Hammond and Whiting that is bounded by 129th Street to the south, parts of Birch Street and New York Avenue to the west, 121st Street to the north and company property to the east; the other in East Chicago that extends just beyond the plant's southeastern fence line toward LTV Steel Co. and the neighborhood of Marktown.

Jack Barnette, chief of the EPA's emergency response section, has said that East Chicago, Whiting and Hammond, with their many oil and steel companies, "sits on a sea of oil that's accumulated over the years," starting with the open-pit storage of oil during World War II.

Heavy rains over past years have caused the groundwater table to rise, lifting oil to drainage sewers that funnel it to area waterways.

Ron Novak, director of the Hammond Department of Environmental Management, said he could not recall a larger underground leak than Amoco's that can be tied to a single source.

People long feared that the former Energy Cooperative Inc. site south of Amoco in East Chicago held about 50 million gallons. On Wednesday, EPA officials whittled that estimate to 2 million gallons.

Appendix R

News Release of Amoco Oil Co., 6/17/92
Little Oil off Refinery Site, No Risk to Residents' Health
For Release after 7:00 P.m., June 17, 1992

WHITING (JUNE 17, 1992) -- Amoco Oil Company officials said that the vast majority of petroleum hydrocarbons sitting on groundwater under the refinery has stayed on refinery property, that the underground hydrocarbons do not pose a health risk to area residents.

"Our investigation findings estimate that between 25,000 and 50,000 gallons of underground hydrocarbons have migrated past the refinery's western barrier system into limited portions of the residential area adjacent to the refinery," said Greg Skannal, Amoco remediation coordinator.

"Additionally, the findings of an independently conducted risk assessment determined that these underground hydrocarbons do not pose a short-term or long-term adverse health impact to people living in the area," said Mark Klan, Ph.D., Amoco toxicologist.

The findings were announced tonight to members of Amoco's Citizens' Advisory Committee at their regular monthly meeting. The findings follow Amoco's announcement in January 1991 that 16.8 million gallons of petroleum hydrocarbons had leaked to the ground under the refinery over its 102-year history. At that time, Amoco said it wanted to test in the community to see if hydrocarbons had migrated beyond refinery property.

"We continue to be encouraged by study findings," said Frank Citek, refinery manager. "Although we regret that any off-site migration has occurred, we are encouraged to learn that a very small portion, less than 0.3% (three parts in one thousand) of the total amount under the refinery, has travelled beyond our well-point system," he said.

Skannal said that the underground petroleum hydrocarbons that had migrated to the community were located in isolated pockets along First Street, right up next to the re-

finery's well-point system on its western border, and along the refinery's unused utility corridor near 126th Street. He said the pockets were located on top of the water table which varies from four feet to 10 feet underground. The locations of the pockets were determined by samples taken from the 56 groundwater monitoring wells installed in the community by Amoco since January 1991.

Skannal said that Amoco had already taken several actions to prevent further migration of underground petroleum hydrocarbons into the community. He said the refinery's well-point systems have caused groundwater, and any hydrocarbons floating on it, to flow away from the community, back toward the refinery. He said that a pilot well-point system installed about six months ago in the Indiana tankfield is further increasing the groundwater flow back toward the refinery, and that Amoco was upgrading this system as a permanent installation.

"In addition to the current systems, Amoco's Groundwater Management Section, Remediation Services Division, and consultants are now evaluating several techniques to collect the hydrocarbons that have migrated off-site," Skannal said. "We are using computers to model recovery wells and other techniques that can further expedite the recovery of the off-site hydrocarbons. Based upon these computer models, we will select the most effective technique, or combination of techniques, to relocate and recover these hydrocarbons from the community," he said.

Skannal said that field work to install the selected system would begin after the results of the computer modelling were analyzed.

Skannal said that in the latter part of June Amoco would begin work to remediate the unused NIPSCO utility duct under 129th Street and New York Avenue, the unused city sewer under 129th Street, and the utility sleeves beneath the railroad tracks at 125th Street and 126th Street. He said this work was being done to prevent these abandoned structures from serving as conduits for the migration of any underground hydrocarbons.

"The manholes associated with these structures will be

filled with grout," Skannal said. "As a precaution, some of the personnel performing this work will be dressed in personal protection equipment. While this work is being done some traffic will have to be re-routed. We plan to keep traffic disruption to a minimum and will work with local police to minimize any inconvenience to residents."

Appendix S

In the Indiana Court of Appeals
Brief of the Intervenors
Table of Contents

Page

Table of Authorities iii
Statement of the Issues 1
Statement of the Case 2
Statement of Relevant Facts 5
Summary of the Argument 9
Argument 14

I. The Trial Court Erred When it Certified this Mass Tort Class Action as a Mandatory Class under Indiana Trial Rule 23(B)(1) 14

A. Certification Under Indiana Trial Rule 23(B)(1)(a) Was Improper Because Amoco Would Not Have Been Subjected To Incompatible Standards Of Conduct 19

B. Certification Under Indiana Trial Rule 23(B)(1)(b) Was Improper Because Separate Adjudications Would Neither Dispose Of Other Class Members' Interests, Nor Substantially Impair or Impede The Ability Of Other Class Members To Protect Their Interest 19

II. The Intervenors Were Denied Due Process of Law When They Were Refused Notice and a Hearing Regarding Class Certification, and Were Refused the Opportunity to Opt out of this Class Action 23

A. The Intervenors Were Denied Their Rights Under The Due Process Clause When They Were Not Given Any Pre-Certification Notice Of This Potential Class 23

B. The Failure To Conduct A Meaningful Hearing Regarding The Mandatory Class Certification Violated Due Process Of Law 26

C. The Trial Court Violated The Due Process Clause When It Refused To Allow The Intervenors To Opt Out Of This Improperly Certified Class Action 29

III. Judge McLaughlin's Appointment as Special Judge Was Revoked When He Failed to Comply with the Jurisdictional Requirements Of Trial Rule 79 35

A. Judge McLaughlin's Failure To Appear And Qualify, As Required Under Trial Rule 79(5), Revoked His Appointment As Special Judge And Left Him Without Authority To Issue Any Order That Is Binding Upon The Intervenors 36

B. The Intervenors Had A Right To Object To Judge McLaughlin's Improper Certification And Did So In A Timely Manner 39

C. The Intervenors Objection To Judge McLaughlin's Lack Of Jurisdiction Must Be Given Effect Regardless Of The Stage Of These Proceedings 44

IV. The Transfer of this Action from Lake to Newton County under Former Indiana Trial Rule 76 Constituted a Wholesale Peremptory Challenge to Any Black Juror and Violated the Equal Protection Clause 45

Conclusion 48

Appendix T

In the Supreme Court of Indiana
Intervenors' Brief in Support of Transfer
Table of Contents

Page

Table of Authorities ii
Argument In Support Of Transfer 1
I. The Court of Appeals Failed to Address a Substantial Question Arising from the Record and Argued by the Intervenors 1
II. The Court of Appeals Opinion Contravened Indiana Supreme Court Precedent, Incorrectly Decided New Questions of Law and Materially Misstated the Record ..3
A. The Court Of Appeals Contravened Supreme Court Authority and Incorrectly Decided A New Question Of Law In Holding The Intervenors Waived Their Due Process Arguments For Appeal 3
B. The Court of Appeals Materially Misstated The Record, As Well As Incorrectly Decided A New Question Of Law, When It Held That The Intervenors' Involuntary Participation At Trial Waived Their Properly Preserved Issues For Appeal 4
C. The Court Of Appeals Contravened Supreme Court Precedents And Relied Upon Material Misstatements Of The Record In Holding The Intervenors Waived Their Objection To Judge McLaughlin's Jurisdiction 6
III. The Court of Appeals Contravened Supreme Court Precedent and Incorrectly Determined a New Question of Law When it Held Amoco Proffered a Race-neutral Justification for the Transfer of Venue 7
IV. The Court of Appeals Contravened Supreme Court Precedent and Relied upon Material Misstatements of the Record in Holding the Intervenors Waived the Class Certification Issue for Appeal 8
Conclusion 13

Appendix U

In the United States District Court
Western District of Missouri
Western Division

City of Independence, *Plaintiff*
v. 95-0019-CV-W-2
Amoco Oil Company, *Defendant*

Christopher Petrovic, *Plaintiff*
v. 95-0021-CV-W-2
Amoco Oil Company, *Defendant* July 30, 1998

Transcript of Fairness Hearing

On Thursday, July 30, 1998, the above-entitled cause came on before the Honorable Fernando J. Gaitan, Jr., United States District Judge, sitting in Kansas City, Missouri.

For the Class: Allan Kanner, Ken McClain, Elizabeth Cowen, James Ziegler

For Amoco: Thomas Ryan, Evan Westerfield, Mark Holstein

For the Objectors: James Borthwick, Arthur Benson, Jamie Lansford, Shirley Keeler, Beverlee Roper

Donna M. Turner RMR
U.S. Court Reporter
811 Grand Avenue, Room 443
Kansas City, MO 64106 (816) 512-5641

at 21-23:
Mr. Ryan: Thomas Ryan for Amoco, Your Honor.
There's not much that I can add to what has been said

regarding the settlement. I would like to address a couple of issues. The homeowners have repeatedly raised or at least the objectors have raised the issue of Amoco's access rights to their property. Those rights are actually quite restricted. It is only in the event that the property is contaminated, in the event they are under an order to clean it up by the EPA, who will be supervising, or the state agency who will be supervising Amoco in its work. Amoco cannot go on the property day or night. We have to go to the people and say we need to get on and work out an arrangement with them.

The bulk of the work that Amoco has done here and elsewhere is done in street right-of-ways and no access ultimately is required. There are some exceptions to that. Occasionally we will be asked by an agency to test basement air or something, and then we do have to go into the basements.

I have never heard a complaint about any Amoco access at any site in terms of inconvenience to the people. And Amoco is very sensitive to that. It understands the residents' concerns and it will act accordingly. But as was said, if you want it cleaned up, we have to be allowed near it to do it.

I think that one thing that was not mentioned is that the contamination in Sugar Creek is at very low levels. It is dissolved and it is in the groundwater and in Sugar Creek the groundwater runs as deep as 60 feet. It is not near the houses. Now, it does vary.

Whiting is worse. And in Whiting, a jury looked at this for two months and heard several residents testify and several experts testify with respect to the alleged damage to property values and the jury returned a verdict holding Amoco not liable. And Amoco didn't deny that it had oil off-site. In fact, it was Amoco's announcement that it might have oil off-site and it wanted to do testing that started those lawsuits. So this wasn't an issue of can you prove where the oil is or anything like that....